

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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Appellate Case No. 2013-000115
Lower Court Case No. 2008-GS-40-07372

JUL 25 2014

S.C. Supreme Court

State of South Carolina

Respondent

v.

Kendra Samuel

Petitioner

BRIEF OF PETITIONER

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CERTIFICATION OF COUNSEL

Counsel for the Appellant hereby certify, pursuant to Rule 226(c) of the South Carolina Appellate Court Rules, that a petition for rehearing before the Court of Appeals was made and finally ruled upon by that Court.



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ISSUE ON APPEAL

Did the Court of Appeals err in instructing the trial court to conduct a State v. Council scientific reliability analysis of a polygraph prior to permitting a jury to consider the effect of a polygraph and its results on the voluntariness of a confession, as is required by the Due Process Clause of the Fourteenth Amendment?

STATEMENT OF THE CASE

On August 6, 2008, the Richland County Sheriff's Department arrested and charged twenty-one year old Kendra Samuel with Homicide by Child Abuse. (App. pp. 354-55). The allegations stemmed from the July 31, 2008 death of two month old Aiden Harling. (App. pp. 354-55). The Richland County Grand Jury indicted Samuel with this offense on September 19, 2008. (App. pp. 356-57).

Prior to trial, Samuel moved pursuant to Jackson v. Denno, 84 S. Ct. 1774, 1780 (1964), to exclude from evidence five statements given to law enforcement and submitted a memorandum of law in support thereof. (App. p. 201; pp. 202-214). The State of South Carolina called Samuel's case to trial on November 29, 2010. (App. p. 7, lines 6-8). After drawing the jury, the trial court considered Samuel's motion to exclude statements to law enforcement. (App. p. 20). Following extensive pre-trial testimony, the trial court ruled upon the pending motion, finding by a preponderance of the evidence that all of Samuel's statements—including a statement procured in the midst of a polygraph examination—were voluntarily made and would be submitted to the jury. (App. p. 185, line 1-p. 191, line 11).

Immediately following the Jackson v. Denno pretrial hearing, however, Samuel argued to the trial court that, if the jury was to consider the voluntariness of the polygraph-procured confession, Samuel must be able to present to the jury the totality of the circumstances of that confession—including the details of the polygraph and its results. (App. p. 191, line 23-p. 192, line 8) Samuel further posited that, if South Carolina law prohibited the introduction of the polygraph and its results into evidence, she would be denied due process under the Fourteenth Amendment and thus the polygraph-procured

confession should be excluded under a Rule 403, SCRE, “prejudicial effect vs. probative value” analysis. The trial court agreed with Samuel’s Due Process/Rule 403 analysis and excluded the polygraph-procured statement from introduction into evidence. (App. p. 192, line 9)

Rather than proceeding with trial, the State immediately appealed the trial court’s exclusion of the polygraph-procured confession. (App. p. 193, lines 3-20). The State’s Notice of Appeal as to the one excluded statement was filed on December 1, 2010. (App. pp. 358-59). Samuel filed a Notice of Cross-Appeal as to all statements allowed into evidence on December 8, 2010. (App. pp. 360-61).

The Court of Appeals issued an opinion on November 14, 2012 reversing the trial court’s suppression of the polygraph-procured confession and affirming the trial court’s admission of the remaining statements. Samuel filed a Petition for Rehearing as to the polygraph-procured confession ruling. The Court of Appeals denied the Petition for Rehearing on December 18, 2012. The Supreme Court granted Samuel’s Petition for a Writ of Certiorari on June 11, 2014.

STATEMENT OF FACTS

The central allegations of the present case—which have yet to be tried to a jury—are that on July 31, 2008 Samuel caused or contributed to the death of Aiden Harling, the infant child of her roommate. In the days immediately subsequent to the child's death, Samuel, Harling's mother, and numerous other witnesses cooperated with the investigation of the City of Columbia Police Department. (App. p. 72, line 14 - p. 74, line 25; p. 106, line 5 - p. 108, line 25).

On the morning of August 6, 2008, Kendra Samuel voluntarily traveled to the City of Columbia Police Department to discuss with authorities the circumstances of Aiden Harling's death. (App. p. 26, lines 8-18). Samuel was met at the Department by Investigator Joe Gray who informed her that he wished to perform a polygraph examination upon her, explained the different steps of the polygraph examination, and advised that she would be presented with several forms pertaining to the examination. (App. p. 27, lines 3-9). After this initial discussion ended, Investigator Gray accompanied Samuel to the polygraph room. (App. p. 27, lines 9-11).

At 10:30 a.m., Investigator Gray presented Samuel with the Department's standard advice of rights form and reviewed it with her. (App. p. 27, lines 14-18; p. 215). At 10:31 a.m., Samuel signed the advice of rights form. (App. p. 29, line 16 – p. 30, line 10; p. 215). Thereafter Investigator Gray spoke with Samuel for approximately 20 minutes about her medical history, her educational background, and her employment history. (App. p. 31, line 12 - p. 33, line 10). After the review of this personal history, Investigator Gray again explained the polygraph process and began to discuss the death of Aiden Harling while reviewing a written statement Samuel previously provided to law enforcement. (App. p.

33, lines 20-24; p. 49, line 19 - p. 50, line 6). At the close of this discussion, Investigator Gray formulated the questions for the polygraph examination, reviewed every question with Samuel, and suggested that the two take a break before the testing began. (App. p. 33, line 25 - p. 34, line 6).

Investigator Gray began conducting the polygraph examination on Kendra Samuel at 11:53 a.m. (App. pp. 335-50). The examination consisted of eleven questions asked of Samuel in three rounds of identical questioning. (App. pp. 335-50). Gray testified that the “relevant questions” of the polygraph were as follows.

Do you know how that child was hurt?

Did you do anything to hurt that child?

Do you know who hurt that child?

(App. p. 52, line 2 - p. 53, line 3; pp. 335-50). Samuel answered “no” to each of these questions and, according to Gray, the polygraph indicated deception as to each of these answers. (App. p. 52, line 19 - p. 53, line 3; pp. 335-50).

Upon cross-examination, Samuel’s attorney directly questioned Gray about the vague nature of his relevant questions.

Q. “That child.” Why didn’t you use the child’s name?

A. That’s the proper procedure in this type of question.

Q. To not make it specific?

A. Yes, sir.

(App. p. 59, lines 19-22). Even though the specific questions directed to Samuel were of this highly general nature, Gray insisted that no confusion or problems with the polygraph might have arisen because “when I reviewed the questions with her prior to the test, I told

her, ‘When I ask that question during the test, I’m talking about Aiden and no one else.’” (App. p. 60, lines 14-17). Gray provided no explanation as to why the actual relevant questions did not specifically refer to Aiden Harling beyond his insistence that “that’s the proper procedure.” (App. p. 59, line 20).

The third and final round of questioning concluded at 12:16 p.m. (App. pp. 335-50; p. 50, lines 17-20). Following the conclusion of the questioning, Investigator Gray left Samuel to review the charts produced by the examination. Gray’s review of the examination results lasted approximately 15 minutes. (App. p. 50, line 17 - p. 51, line 8). At approximately 12:31 p.m., Gray testified that he “went back into the room and confronted [Samuel] with the test results,” (App. p. 51, lines 7-8) “told her there were some problems on the examination which indicated deception ... [and] pulled my chair up in front of her.” (App. p. 53, lines 20-25). As Investigator Gray confronted Samuel with the results of her polygraph examination, he began to interrogate her further and Samuel relayed to him a statement pertaining to the date of Aiden Harling’s death. (App. p. 54, line 2 - p. 55, line 4). The substance of Samuel’s statement, which was never recorded or written down by Investigator Gray, was as follows.

...[S]he initially said the child had—accidentally hit the child’s head on a car seat safety bar as she tried to remove the child from the seat. ...[S]he admitted she had accidentally dropped the child from a standing position as she removed the child from the seat which was on the floor in Jessica’s room. ...She said the child gasped when she picked him up, and he was unresponsive, though his eyes were open. She said she held him in her lap and shook his arms. She may have grabbed his torso and shook him in an attempt to revive him. [She] said the child was then unconscious. ... Ms. Samuels said she didn’t know what to do.

(App. p. 54, lines 3-22). Samuel's statement given to Investigator Gray during the course of the polygraph examination and review ended at approximately 1:00 p.m. (App. p. 55, lines 13-15).

ARGUMENT

The Court of Appeals erred in instructing the trial court to conduct a Council scientific reliability analysis of a polygraph prior to permitting a jury to consider the effect of a polygraph and its results on the voluntariness of a confession, where the Due Process Clause of the Fourteenth Amendment requires the totality of the circumstances of the confession be presented to the jury.

The Court of Appeals erred in reversing the trial court's suppression of the polygraph-procured confession by holding that the trial court should have applied the Council reliability analysis to the polygraph at issue. Both case law and scientific studies have shown the details of a polygraph and its results are important factors to analyze when considering the voluntariness of a confession obtained therefrom. The Due Process Clause of the Fourteenth Amendment requires that the totality of the circumstances of a confession be presented to a jury so that the jury may properly consider whether the confession was voluntary, regardless of whether those circumstances may include scientifically unreliable "testing." Thus the Court of Appeals erred in instructing the trial court to conduct a Council analysis of the polygraph's reliability before admitting the polygraph-procured confession into evidence. The Court of Appeals should have affirmed the trial court's decision to suppress the admission of the polygraph-procured confession into evidence absent presentation of the totality of its circumstances or, in the alternative, held that the details of the polygraph-procured confession (including the polygraph and its results) were admissible for the limited purpose of analyzing the voluntariness of the confession.

- a. The details and circumstances surrounding a polygraph examination are relevant considerations of the voluntariness of a confession procured from the polygraph.**

The central question as to whether a defendant voluntarily confessed "is whether the defendant's will was overborne when [she] confessed." State v. Von Dohlen, 322 S.C.

234, 243, 471 S.E.2d 689, 695 (1996). Considerations of involuntariness are not isolated to physical threats or intimidation, but extend to psychological ploys such as “police misrepresentations,” “direct or indirect promises,” and “the exertion of improper influence.” State v. Moses, 390 S.C. 502, 513-14, 702 S.E.2d 395, 401 (Ct. App. 2010). Not only have such psychological ploys been shown to effectively procure confessions, but they have also been shown to produce confessions that, in reality, are completely false.

[P]ostconviction DNA testing has exonerated 252 convicts, forty-two of whom falsely confessed to rapes and murders. There is a new awareness among scholars, legislators, courts, prosecutors, police departments, and the public that innocent people falsely confess, often due to psychological pressure placed upon them during police interrogations. Scholars increasingly study the psychological techniques that can cause people to falsely confess and have documented how such techniques were used in instances of known false confessions.

Garrett, Brandon L., The Substance of False Confessions, 62 Stan. L. Rev. 1051, 1052-1053 (2010).

Some courts have, for decades, recognized the potential for polygraph administration to create an element of psychological coercion of a witness. “The use of a polygraph will not, in and of itself, render a confession inadmissible as the product of coercion. However, the use or misuse of a polygraphic examination is certainly a factor to be considered in determining whether there was impermissible coercion.” People v. Leonard, 59 A.D.2d 1, 14-15, 397 N.Y.S.2d 386, 394 (N.Y. 1977). Scientific research has further demonstrated the potentially overbearing effects of a polygraph.

If the suspect is innocent, being told that their body language gives away their deceit may be an unnerving experience if the suspect believes in the interviewer’s diagnostic powers. In many of the documented cases involving false confessions (e.g., Gudjonsson & Lebegue, 1989), the initial uncertainty

of a suspect concerning an incident was replaced with a false belief that they had committed an offence. In many of these cases the polygraph was instrumental in convincing the suspect that their “lies” had been detected and thus revealing their guilt. Telling a suspect that his lies have been uncovered by “trained observations” may be similarly “effective” in eliciting false statements.

Davies, Graham, Psychology, Law, and Criminal Justice: International Developments in Research and Practice, 94 (Walter de Gruyter & Co. 1995).

The advent of DNA analysis and its application to post-conviction relief have confirmed the susceptibility of polygraphs to produce involuntary and false confessions. In fact, seven of the forty-two false confessions revealed by the study referenced above were obtained, at least in part, as a result of polygraphs.

Polygraph machines were used as part of efforts to secure confessions in at least seven of these cases. . . . Scholars have contended that while polygraphs may not be a reliable means to test the truthfulness of a suspect, they can be used to exert pressure on a suspect and secure admissions. In these cases, telling innocent suspects that they failed a polygraph may have played a role in their false confessions.

Garrett, Brandon L., The Substance of False Confessions, 62 Stan. L. Rev. 1051, 1098-1099 (2010).

The relationship of polygraph examinations to false confessions also is not limited to intentionally coercive law enforcement activity. Scientific studies of polygraphs have revealed widely-varying “false positive” ratios, ranging from 2% to 50.7%. Saxe, Dougherty, and Cross, The Validity of Polygraph Testing: Scientific Analysis and Public Controversy, American Psychologist, Vo. 40, No. 3, 355, 362 (1985). The factors leading to those disturbing ratios of “false positives” are also widely varying. Id. Thus, even law

enforcement personnel wholly devoid of any manipulative motive may, unwittingly, contribute to the procurement of a false confession.

The reality of “false positives” within the use of polygraphs has given rise to attempts to refine polygraph procedures in order to minimize mistakes. “What appear to be very important are the conditions of the test. These probably include, at a minimum, *a narrowly focused question*, an experienced examiner/investigator, and a subject who believes in the efficacy of the test.” *Id.* at 364 (emphasis added). In this case, the “relevant questions” posed to Kendra Samuel during the polygraph examination clearly were not “narrowly focused.”

Do you know how that child was hurt?

Did you do anything to hurt that child?

Do you know who hurt that child?

(App. p. 52, line 2-p. 53, line 3; pp. 335-350) Furthermore, Investigator Gray wrongly believed his strategy of vague questioning to be “the proper procedure.” Thus both the quality of the questioning and the knowledge of the investigator call into question the reliability of the polygraph examination and raise the distinct likelihood that the results presented to Kendra Samuel were, in fact, a “false positive.”

Subsequent to the pretrial Jackson v. Denno hearing, Appellant’s counsel made it clear that—if the polygraph-procured statement was to be introduced to the jury—Appellant would seek to introduce the details of the polygraph and its results during the trial. (App. p. 191, line 23 - p. 192, line 8) Such facts are a part of the “totality of the circumstances” surrounding the polygraph-procured confession that, barring some other

prohibition, must be presented to the jury as a matter of Fourteenth Amendment Due Process.

- b. The Due Process Clause of the Fourteenth Amendment requires the “totality of the circumstances” of the polygraph-procured confession be submitted to the jury for its consideration of voluntariness of the confession.**

The Supreme Court recognizes that the exclusion of involuntary confessions from evidence is a matter of constitutional due process.

It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession ... and even though there is ample evidence aside from the confession to support the conviction.

Jackson v. Denno, 84 S. Ct. 1774, 1780 (1964) (internal citations omitted).

[T]he Fourteenth Amendment forbids the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because of the ‘strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will,’ and because of ‘the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.’

Id. at 1785 (internal citations omitted). As a result, Jackson v. Denno and its progeny formulated a two-step process by which due process pertaining to voluntary or involuntary statements would be ensured.

The process for determining whether a statement is voluntary, and thus admissible, is bifurcated; it involves determinations by both the judge and the jury. First, the trial judge must conduct an evidentiary hearing, outside the presence of the jury, where the State must show the statement was voluntarily made by a preponderance of the

evidence. If the statement is found to have been given voluntarily, it is then submitted to the jury, where its voluntariness must be established beyond a reasonable doubt.

State v. Miller, 375 S.C. 370, 379, 652 S.E.2d 444, 448 (Ct. App. 2007) (internal citations omitted).

The due process analysis of voluntariness considers all of the circumstances pertaining to the statement.

The due process test takes into consideration “the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.” ... The determination “depend[s] upon a weighing of the circumstances of pressure against the power of resistance of the person confessing.”

Dickerson v. United States, 120 S. Ct. 2326, 2331 (2000) (internal citations omitted). This Court has also emphasized the importance of the full “totality of the circumstances” analysis. “[T]he jury should be instructed that they must find beyond reasonable doubt that the statement was freely and voluntarily given under the totality of the circumstances before the statement may be considered.” State v. Torrence, 305 S.C. 45, 52, 406 S.E.2d 315, 319 (1991).

At least one South Carolina case has held that the utilization of a polygraph in procuring a statement is a “circumstance” to be submitted to the jury when considering the voluntariness of the statement. See State v. Cannon, 260 S.C. 537, 544-45, 197 S.E.2d 678, 681 (1973) (“The fact that a polygraph examination was used is another valid consideration in the totality of circumstances.”) Cannon is aligned with other courts across the country. See, e.g., Johnson v. State, 31 Md. App. 303, 306, 355 A.2d 504, 507 (Md. 1976) (“It is within [the jury’s] province to decide that the psychological impact of a polygraph is a mere motivating factor, but it may also determine that it had so coercive an effect as to

render a confession thus obtained involuntary.”); State v. Green, 271 Or. 153, 169, 531 P.2d 245, 253 (Or. 1975) (“[I]t must be recognized that there may be circumstances relating to the conduct of a polygraph examination prior to the giving of a confession which the defendant may desire to urge as grounds in support of a contention that the confession was not given voluntarily, but was the product of coercion and psychological pressure.”) Thus, without any other conflicting authority, the details of the polygraph and its results in this case should be fully admissible once the polygraph-procured confession is presented to the jury.

- c. **South Carolina law finds polygraphs and their results to be “generally inadmissible” due to questions of reliability and threats of prejudice. The law further finds that cautionary instructions are insufficient to cure such prejudice.**

South Carolina evidentiary law consistently has barred the admissibility of not only polygraph results, but details surrounding the polygraph itself. As early as 1959, this Court recognized that grave concerns regarding the scientific reliability of the polygraph prevented its introduction as evidence of guilt or innocence.

It would appear, at least in the absence of stipulation, that the courts almost uniformly reject the results of lie detector tests when offered in evidence for the purpose of establishing the guilt or innocence of one accused of a crime, whether the accused or the prosecution seeks its introduction. The reason most commonly assigned for the exclusion of such evidence is the contention that the lie detector has not as yet attained scientific acceptance as a reliable and accurate means of ascertaining truth or deception.

State v. Britt, 235 S.C. 395, 421-22, 111 S.E.2d 669, 683 (1959), overruled on other grounds by State v. Torrence. By 1986, the caution over the admissibility of a polygraph had matured into per se inadmissibility.

Evidence regarding the results of a polygraph test or the defendant's willingness or refusal to submit to one is

inadmissible. A trial judge should be meticulous in ensuring that the jury makes no improper inference from any reference to a polygraph.

State v. Pressley, 290 S.C. 251, 252, 349 S.E.2d 403, 404 (1986) (internal citations omitted). In fact, the Court of Appeals went so far as to find that “the results of a polygraph test are not admissible as evidence where the parties, as here, *expressly stipulated* to their admissibility.” Rutledge v. St. Paul Fire & Marine Ins. Co., 286 S.C. 360, 370, 334 S.E.2d 131, 137 (Ct. App. 1985)(emphasis supplied). The Rutledge court noted that it “agree[d] with the Supreme Court of North Carolina for the reasons stated in [State v. Grier, 307 N.C. 628, 645, 300 S.E.2d 351, 360 (N.C. 1983)].” Id. Within that opinion, the North Carolina court observed as follows.

[T]he admission by stipulation approach does not resolve some of the more perplexing problems attendant to the use of polygraph evidence. The validity of the polygraphic process is dependent upon such a large number of variable factors, many of which are extremely difficult, if not impossible, to assess, that we feel the stipulation simply cannot adequately deal with all situations which might arise affecting the accuracy of any particular test.

Id. at 645, 300 S.E.2d at 360. Grier went on to reject the notion that cautionary instructions to the jury could eliminate the threat of prejudice inherent in polygraphic evidence.

Based upon the presentment of this particular form of scientific evidence, present-day jurors, despite their sophistication and increased educational levels and intellectual capacities, are still likely to give significant, if not conclusive, weight to a polygraphist's opinion as to whether the defendant is being truthful or deceitful in his response to a question bearing on a dispositive issue in a criminal case. To the extent that the polygraph results are accepted as unimpeachable or conclusive by jurors, despite cautionary instructions by the trial judge, the jurors' traditional responsibility to collectively ascertain the facts and adjudge guilt or innocence is preempted.

Id. at 644, 300 S.E.2d at 360.

The Pressley and Rutledge prohibition on the admissibility of polygraphic evidence ran headlong into the Jackson v. Denno “totality of the circumstances” voluntariness analysis in the case of State v. Wright, 322 S.C. 253, 471 S.E.2d 700 (1996). In Wright, a criminal defendant sought to admit a polygraph into evidence not to prove truth or falsity, but rather in order to demonstrate the involuntariness of a confession. In line with Pressley and Rutledge, the trial court and this court held that “the authority against admitting evidence of polygraph examinations and the potential prejudice to appellant” prohibited the admission of the polygraph evidence. State v. Wright at 256, 471 S.E.2d at 702.

Appellant sought to disclose the polygraph examiner's misinformation to show the jury that the confession was not given voluntarily. However, appellant did not suggest at trial nor on appeal what limitation could have been placed on the disclosure to limit prejudice to appellant. Without some limitation, the only inference the jury could reasonably have drawn from learning appellant's confession followed closely after a deceptive polygraph was that the confession was truthful and the answers given to the polygraph exam were untruthful. This would serve to bolster the confession rather than persuade the jury to believe the alleged coercion.

State v. Wright, 322 S.C. 253, 256, 471 S.E.2d 700, 702 (1996). Wright offered no insight as to what “limitation” could harmonize Jackson v. Denno’s “totality of the circumstances” requirement with the evidentiary concerns of prejudice, particularly in light of the rejection of “admission by stipulation” and “admission with cautionary instructions” in Rutledge.

d. The trial court correctly suppressed the polygraph-procured confession by harmonizing the due process concerns of the Fourteenth Amendment and the reliability/prejudice concerns of South Carolina evidentiary law.

In this case, the State’s decision to introduce the polygraph-procured confession to the jury presented the trial judge with the following constitutional conundrum: when the polygraph-procured confession is presented to the jury, how can Jackson v. Denno’s

“totality of the circumstances” analysis be reconciled with the Pressley/Rutledge/Wright prohibition on the admissibility of polygraphs (even in the presence of stipulation or cautionary instruction)? It is axiomatic that the trial court must adhere to both the constitutional precedent of the United States Supreme Court and the South Carolina precedent of our State appellate courts. In light of the above-referenced authority, the trial court found that the admission of the polygraph-procured confession in the absence of evidence of the polygraph and its results would unfairly prejudice the Appellant pursuant to Rule 403, SCRE.

Rule 403 establishes that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice...”. Rule 403, SCRE. “‘Unfair prejudice’ within its context means an undue tendency to suggest decision on an improper basis...”. State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991), citing Fed. R. Evid. 403, advisory committee's note. Here, the “improper basis” and “unfair prejudice” would be consideration of the polygraph-procured confession without the benefit of the totality of its circumstances: a consideration that violates the Jackson v. Denno line of authority and the Fourteenth Amendment’s Due Process Clause.

The Court of Appeals did not contest that consideration of the polygraph-procured confession without the totality of its circumstances would violate Jackson v. Denno. Rather the Court of Appeals asserted the trial court erred in presuming the polygraph evidence and results were inadmissible, latching onto Wright as “suggesting ... that polygraph evidence could potentially be admissible in trial, if sufficient safeguards were in place to limit the possible prejudice to the defendant”. (App. p. 447). The Court viewed the “safeguards” as materializing in the case of State v. Council, 335 S.C. 1, 24, 515 S.E.2d 508, 520 (1999),

which walked back the per se inadmissibility of polygraph testing and results: “in light of the adoption of the SCRE, admissibility of this type of scientific evidence should be analyzed under Rules 702 and 403, SCRE and the Jones factors.” Id. at 24, 515 S.E.2d at 520. Three years later, this court explained in more detail what this new Council analysis would entail.

Under Rule 702, SCRE, the trial judge must find: (1) the scientific evidence will assist the trier of fact; (2) the expert witness is qualified; and (3) the underlying science is reliable. The trial judge should determine the reliability of the underlying science by using the Jones factors: the publication of peer review of the technique; prior application of the method to the type of evidence involved in the case; the quality control procedures used to ensure reliability; and the consistency of the method with recognized scientific laws and procedures. Further, if the evidence is admissible under Rule 702, SCRE, the trial judge must determine if its probative value is outweighed by its prejudicial effect under Rule 403, SCRE.

State v. McHoney, 344 S.C. 85, 96, 544 S.E.2d 30, 35 (2001). Despite looking through this new evidentiary prism, however, this Court again rejected the admissibility of polygraph tests and results: “there is simply no consensus that polygraph evidence is reliable. To this day, the scientific community remains extremely polarized about the reliability of polygraph techniques.” Id. at 96, 544 S.E.2d at 35, quoting United States v. Scheffer, 118 S.Ct. 1261, 1265 (1998).

Nevertheless, here the Court of Appeals reversed the trial court’s ruling, insisting that “[t]he trial court could have conducted an analysis pursuant to Council to determine what evidence, if any, regarding the polygraph examination was admissible in the present case.” (App. p. 447). The Court of Appeals suggested evidentiary analysis, however, fails to address the constitutional quandary faced by the trial court.

Importantly, neither the Appellant nor the State has presented any evidence (or even argued) that the scientific reliability of the polygraph has advanced sufficiently since Council and McHoney to justify its admission as evidence of truth or falsity of a confession. While both Council and McHoney are relatively recent analyses of the scientific reliability of the polygraph, more recent analyses continue to exclude the polygraph from evidence. “An examination that is better than mere chance, based on inexact science, and which, at most, proves only a subjective ‘truth’ is simply not accurate or reliable enough to satisfy the requirements for admissibility of expert testimony.” United States v. Pavlenko, 845 F. Supp. 2d 1321, 1326 (S.D. Fla. 2012) (citations omitted). Thus the Court of Appeals’ instruction to consider, once again, the admissibility of polygraph evidence through the filter of Council rings hollow. Whereas polygraphs continue to be unreliable, a third Council analysis will leave the trial court where it stood at the outset: facing a confession procured from a scientifically unreliable and potentially prejudicial “lie detector test” that, to be admitted, must be admitted with the totality of its circumstances.

- e. If the polygraph-procured confession is to be submitted to the jury, the totality of its circumstances—including the details of the polygraph examination and its results—must also be submitted to the jury along with cautionary instructions sufficient to deter threats of prejudice.**

As an alternative to affirming the trial court, the Court of Appeals could have limited or reconsidered its own subscription to the reasoning of the North Carolina Supreme Court in State v. Grier. The State of New York, for example, permits polygraph evidence to be introduced for the sole purpose of determining the voluntariness of a confession. Such evidence is accompanied by an appropriate limiting instruction to the jury.

[W]hile polygraph evidence is not admissible on the issue of guilt or innocence, if a proper foundation is established, such evidence may be admitted on the limited issue—which is central to this case—of the voluntariness of defendant's confession. If defendant's passing of the polygraph exam remains an issue at trial and defendant's polygraph evidence is admitted, it will be accompanied by a limiting instruction that it may not be considered on the issue of guilt or innocence but only on the issue of the voluntariness of defendant's confession.

People v. Kogut, 10 Misc. 3d 245, 247, 805 N.Y.S.2d 789, 791 (N.Y. Sup. Ct. 2005).

The potential for prejudice in the admission of the polygraph evidence—warned of by State v. Grier—exists despite cautionary instructions to the jury. Initially, this concern appears to contradict the long-held observation that “we must assume that the jury obeyed the instructions of the court...”. Wilson v. Palmetto Nat. Bank of Columbia, 113 S.C. 508, 101 S.E. 841, 842 (1920). Nevertheless, the State of Oregon recognizes a rule that permits polygraph-procured confessions into evidence while making efforts both to address the potential for prejudice and to permit the Defendant to exercise his due process rights.

‘In laying the legal foundation for the admissibility of a confession obtained before, during, or after a Polygraph examination, a prosecuting attorney is confronted with a task requiring considerable caution. He must seek to avoid any reference by prosecuting witnesses to the results of the Polygraph examination or even to the fact of the examination itself. The procedure that should be followed is to introduce as a witness the examiner, or someone else to whom the confession may have been made or repeated, and through him lay the foundation for the admissibility of the confession by merely proving its voluntary character (i.e., the absence of any threats, force, or objectionable promises); and all this without any mention of the fact that a Polygraph had been used or contemplated. In this way the prosecution will avoid any danger of reversible error occasioned by reference to the Polygraph. The choice, therefore, will rest with the defense attorney as to whether or not he wants to inject the Polygraph issue into the case for the purpose of attempting to show that it or the technique was a coercive factor which compelled the defendant to confess.’

State v. Green, 271 Or. 153, 170, 531 P.2d 245, 253 (Or. 1975), quoting Reid & Inbau, Truth & Deception: The Polygraph ('Lie-Detector') Technique at 254 (1966).

Under such a construct, polygraph-procured confessions would be held to be fully admissible at trial. The State, initially, will be precluded from introducing reference to the polygraph or its results in order to avoid concerns of prejudice set forth within the Rutledge/Pressley/Wright line of cases. Pursuant to Fourteenth Amendment due process, the Defendant may, on cross examination, inject the polygraph evidence and results into the case. The choice as to whether to risk potential prejudice associated with such evidence remains with the Defendant to balance against the weight the evidence may lend to considerations of voluntariness of the polygraph-procured confession.

CONCLUSION

For the reasons stated herein, the Court should reverse the ruling of the Court of Appeals, and affirm the trial court's suppression of the polygraph-procured confession. In the alternative, the Court should reverse the trial court's suppression of the polygraph-procured confession and adopt a rule that permits the admission into evidence of the totality of the circumstances of the confession, including the polygraph and its results.

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appellate Case No. 2013-000115
Lower Court Case No. 2008-GS-40-07372

S.C. Supreme Court

State of South Carolina

Respondent

v.

Kendra Samuel

Petitioner

CERTIFICATE OF SERVICE

I, Holli Langenburg, paralegal to Richard A. Harpootlian, P.A., with offices at 1410 Laurel Street, Post Office Box 1090, Columbia, South Carolina 29202, hereby certify that on July 25, 2014, I served by having the same placed in the U.S. Mail, first class postage affixed thereto, the following document to the below mentioned person(s):

Document: Final Brief of Petitioner

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