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THE ADMISSIBILITY OF POLYGRAPH ("Lie-Detector") EVIDENCE PURSUANT TO STIPULATION IN CRIMINAL PROCEEDINGS

AMERICAN COURTS have traditionally held that evidence pertaining to the results of a lie-detector test is inadmissible in a criminal proceeding on behalf of either the prosecution or defense.¹ Following this view, the courts have held that it is a prejudicial error to permit comment upon the mere fact that such a test was conducted² or upon the refusal or willingness of a defendant to submit to one.³ It has also been held that a defendant in a criminal proceeding does not have a constitutional right to have a lie-detector test administered to him.⁴ Some of the reasons relied upon by the courts in rejecting the offer of lie-detector evidence have been that the lie-detector cannot be cross-examined,⁵ testimony pertaining to such tests is inadmissible as hearsay,⁶ it may unduly influence a jury,⁷ and it threatens to usurp the traditional role of the jury as ultimate finder of fact.⁸ However, the fundamental basis for this wholesale exclusion of such evidence has been the refusal of the courts to recognize the lie-detector as a scientifically reliable method of ascertaining truth or deception.⁹

In recent years, however, a few jurisdictions have withdrawn from the traditional approach and have admitted lie-detector evidence in limited situations, notwithstanding objection by the adverse party. The most significant of these decisions is that of the Arizona Supreme Court in *State v. Valdez*¹⁰ wherein it was observed: "Although much remains to be done to perfect the lie detector as a means of determining credibility we

¹ See, e.g., *Bowen v. Eyman*, 324 F. Supp. 339 (D.C. Ariz. 1970); *Kaminski v. State*, 63 So.2d 339 (Fla. 1963); *People v. Frechette*, 380 Mich. 64, 155 N.W. 2d 830 (1968); *State v. Perry*, 274 Minn. 1, 142 N.W.2d 573 (1966); *State v. Royster*, 57 N.J. 427, 273 A.2d 574 (1971); *State v. Foye*, 254 N.C. 704, 120 S.E.2d 169 (1961); *Lee v. State*, 455 S.W.2d 316 (Tex. Cr. App. 1970).

² *People v. Nicholls*, 44 Ill.2d 533, 256 N.E.2d 818 (1970).

³ *State v. Emory*, 190 Kan. 406, 375 P.2d 585 (1962); *State v. Kolander*, 236 Minn. 209, 52 N.W.2d 458 (1952); *Barber v. Commonwealth*, 206 Va. 241, 142 S.E.2d 484 (1965).

⁴ *State v. Freeland*, 125 N.W.2d 825 (Iowa 1964); *Hyde v. Warden of Maryland Penitentiary*, 235 Md. 641, 202 A.2d 382 (1964); *State ex rel. Sheppard v. Koblenz*, 174 Ohio St. 120, 187 N.E.2d 40 (1962).

⁵ *Boeche v. State*, 151 Neb. 368, 37 N.W.2d 593 (1949).

⁶ *United States v. Stromberg*, 179 F.Supp. 278 (S.D. N.Y. 1959).

⁷ *State v. Cole*, 354 Mo. 181, 188 S.W.2d 43 (1945).

⁸ *State v. Smith*, 113 Ohio App. 461, 178 N.E.2d 605 (1960).

⁹ *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

¹⁰ 91 Ariz. 274, 371 P.2d 894 (1962).

think it has been developed to a state in which its results are probative enough to warrant admissibility upon stipulation."¹¹ The court thus held that expert testimony based upon the results of lie-detector tests conducted upon a defendant in a criminal proceeding is admissible in evidence where, prior to such tests, the state and the defendant have so stipulated. However, in absence of such stipulation, Arizona has retained the rule that evidence of this nature may not be admitted over objection.¹² Currently, four other jurisdictions share the view expressed by the *Valdez* decision and to this extent have departed from the traditional judicial attitude toward the lie-detector as a source of competent and admissible evidence in criminal cases.¹³

The Ohio courts have not, as yet, been called upon to decide this issue. With regard to the general admissibility of lie-detector evidence, this state has followed the rule of exclusion.¹⁴ In *Parker v. Friendt*,¹⁵ a civil action, it was held that such evidence is inadmissible in the absence of an agreement between the parties. Whether or not this statement of the law would have any effect in a criminal case where objection is raised has not been decided. The *Parker* decision did infer, however, that the uniform examination and licensing of lie-detector operators would be a prerequisite to the general use of such evidence in a court of law.¹⁶ This would appear to be a desirable subject of legislation to which Ohio has not addressed itself as yet. However, it is this writer's contention that the Ohio courts should consider the admission of such evidence in the limited situations approved in the *Valdez* species of decisions. Following the standards established in these cases, it should be held that the state and the defendant may mutually agree to waive the traditional view of

¹¹ *Id.* at 283, 371 P.2d at 900.

¹² *State v. Sneed*, 98 Ariz. 264, 403 P.2d 816 (1965).

¹³ *Arizona*: *State v. Chambers*, 104 Ariz. 247, 451 P.2d 27 (1969). *California*: *People v. Davis*, 270 Cal. App.2d 847, 76 Cal. Rptr. 242 (1969); *People v. Houser*, 85 Cal. App.2d 686, 193 P.2d 937 (1948). *Florida*: *Butler v. State*, 228 So.2d 421 (Fla. 1969); *State v. Brown*, 177 So.2d 532 (Fla. 1965). *Iowa*: *State v. Galloway*, 167 N.W.2d 89 (Iowa 1969); *State v. McNamara*, 252 Iowa 19, 104 N.W.2d 568 (1960). *Missouri*: *State v. Fields*, 434 S.W.2d 507 (Mo. 1968).

¹⁴ *See Sheppard v. Maxwell*, 231 F.Supp. 37 (S.D. Ohio 1964).

¹⁵ 99 Ohio App. 329, 118 N.E.2d 216 (1954). *Parker v. Friendt* involved an action upon a cognovit note. The defendant cross-petitioned to recover the amount paid thereon claiming that she had signed the note in blank believing it to be a receipt. Defendant submitted to a lie-detector test, the results of which were favorable to her claim. The trial court's refusal to admit these results into evidence was affirmed on appeal.

¹⁶ *Id.* at 337, 118 N.E.2d at 222:

Certain it is that inasmuch as the results of the test depend upon delicate physiological reactions in response to psychological disturbances within an individual, a court, called upon to pass upon the admissibility of such results as evidence in a case, would have to insist that the person conducting the test and testifying in court concerning it have sufficient training and knowledge to fully understand the significance of these manifestations in the human body as related to the subject under consideration of the mechanisms utilized as well as broad experience in the operation of the instrument.

inadmissibility and be permitted to admit lie-detector evidence pursuant to a viable procedure designed to assure the reliability and competence of such evidence. The discussion to follow will propose such a procedure.

It must be understood at the outset that no machine or device can mechanically determine whether or not a particular individual is lying or telling the truth in a given context. In this sense, the term "lie-detector" is a misnomer. However, under proper conditions, truth or deception may be diagnosed through the skilled interpretation of physiological data which have been recorded by an instrument known as a "polygraph."¹⁷ As its name implies, the polygraph consists of a combination of instruments which record pulse rate, blood pressure and respiration. These essential elements may be supplemented by devices which can detect electrodermal responses caused by increased activity of the sweat glands and muscular pressures and movements. The rate and amplitude of these various physiological reactions are in turn visually recorded upon a graph while the subject is being questioned by the polygraph examiner. The polygraph technique proceeds on the theory that, in most cases, a conscious attempt to deceive by an individual in response to a question will cause measurable changes in blood pressure, pulse rate, and breathing.¹⁸ The graphic record of these variations, if any, may then be compared to the questions propounded to the subject during the course of the examination. By interpreting these results, an expert examiner may or may not arrive at a conclusion as to whether or not the subject was responding to the questions in a truthful or deceptive manner.

Thus, when we speak of "lie-detector evidence" we are actually referring to the testimony of an expert witness regarding his conclusions based upon the interpretation of physiological data recorded by a scientific device. For this reason, it should be apparent that the competence of such evidence is very much dependent upon the qualifications and experience of the polygraph examiner.¹⁹ In Ohio, expert testimony regarding scientific tests has been held admissible where there is a foundation showing that the test used was legally acceptable, that the particular apparatus used was reliable, and that the test was conducted and the apparatus used in a competent manner by a qualified person.²⁰ If the rule of admissibility pursuant to stipulation is adopted, the polygraph technique would be

¹⁷ For an extensive and detailed study of the polygraph, its operation, and the application of the "polygraph technique" of ascertaining truth and deception, see F. INBAU & J. REID, *TRUTH AND DECEPTION: THE POLYGRAPH TECHNIQUE* (1966).

¹⁸ J. RICHARDSON, *MODERN SCIENTIFIC EVIDENCE* § 10.1 (1961).

¹⁹ *People v. Zazzetta*, 27 Ill.2d 302, 309, 189 N.E.2d 260, 264 (1963); "...[I]t is common knowledge that the expertise of the operator and interpreter has substantial bearing on the reliability of the polygraph."

²⁰ See *State v. Sickles*, 250 Ohio App.2d 1, 265 N.E.2d 787 (1970) (breathalyzer test); *Columbus v. Marks*, 118 Ohio App. 359, 194 N.E.2d 791 (1963) (blood test).

considered legally acceptable and evidence pertaining thereto would be admissible provided there has been shown a sufficient foundation therefor.

Whether or not an attorney, in preparing for the defense or prosecution of a criminal case, will agree to the administration of a polygraph test to the defendant and stipulate to the admissibility in evidence of the results will inevitably depend upon the circumstances of that particular case. In arriving at a decision, the attorney should consider the defendant's willingness to submit to such a test, the competence of the person who will administer the test and interpret the results, and, most important, whether in light of other available evidence, the testimony of the polygraph examiner will significantly aid the finder of fact in the ultimate determination of guilt or innocence.²¹ The latter consideration may be illustrated by several examples. In prosecutions for crimes such as forgery, there may be substantial reliance upon the testimony of handwriting and fingerprint experts. Like the polygraph expert, their conclusions will be based upon the analysis and interpretation of demonstrable physical impressions. In a proper case, the expert testimony of a polygraph examiner might also aid the finder of fact in reaching a decision as to whether the defendant is guilty of forgery. A further example would be the case where the testimony offered by both sides is in direct conflict. In this regard, consider the following situation. A defendant has been indicted for the armed robbery of a store. The state's evidence consists solely of the testimony of the proprietor and two patrons who were present at the time of the alleged crime. These witnesses are prepared to identify, at trial, the defendant as the man who committed the robbery. On the other hand, the defendant has vigorously denied guilt and claims that he was elsewhere at the time the robbery occurred. To corroborate his story, the defendant has brought forward three alibi witnesses who will testify on his behalf. At trial, the reliability and credibility of all the testimony will be tested by cross-examination. In the end, the ultimate decision of guilt or innocence will be left to the jury who must ascertain the facts by weighing the credibility and reliability of the witnesses.

However, if the defendant, with the advice of counsel, voluntarily agrees to submit to a lie-detector test to affirm his denial of guilt, and both the prosecutor and the defendant agree that the results should be admissible at trial, should this agreement be upheld at trial when either the prosecutor or defendant seeks to withdraw from his agreement? The court could refuse, notwithstanding the agreement, on the ground that

²¹ F. BAILEY & H. ROTHBLATT, *INVESTIGATION AND PREPARATION OF CRIMINAL CASES* § 366 (1970).

the general rule against admissibility cannot be altered by agreement.²² On the other hand, the court could venture to apply the *Valdez* approach and exercise its discretion to determine whether the agreement was voluntary and the testimony of the polygraph examiner sufficiently reliable to aid the jury in its fact-finding function.

The argument on behalf of the latter approach must deal with those arguments which have persuaded the courts to hold such evidence inadmissible in absence of stipulation. A frequent argument against admissibility has been the failure of the proponent to lay a sufficient foundation establishing the reliability and accuracy of the polygraph.²³ The judicial standard for the admission of such evidence was established in *Frye v. United States*,²⁴ which was decided in 1923. In that case it was held that the scientific accuracy and reliability of the lie-detector has not gained such general recognition and acceptance among psychologists and physiologists to support the admission in evidence of expert testimony based thereon.²⁵ Whether or not the polygraph and the polygraph technique have attained this degree of accuracy and reliability in the five decades since *Frye* has largely been a matter of academic rather than judicial debate.²⁶ It should be noted, however, that the standard laid down in *Frye* has not gone unchallenged. Professor McCormick observes that although the standard of "general scientific acceptance" may be a proper condition upon a court's taking judicial notice of the accuracy of a scientific device or method, the proper test for admissibility in evidence

²² *Pulakis v. State*, 476 P.2d 474 (Alas. 1970); *Colbert v. Commonwealth*, 306 S.W.2d 825 (Ky. 1957); *State v. Chavez*, 80 N.M. 786, 461 P.2d 919 (1969); *State v. Trimble*, 68 N.M. 406, 362 P.2d 788 (1961); *Le Fevre v. State*, 242 Wis. 416, 8 N.W.2d 288 (1943).

²³ See *People v. Becker*, 300 Mich. 562, 2 N.W.2d 503 (1942); *People v. Leone*, 25 N.Y.2d 511, 255 N.E.2d 696, 307 N.Y.S.2d 430 (1969); *People v. Forte*, 279 N.Y. 204, 18 N.E.2d 31 (1938); *Looper v. State*, 381 P.2d 1018 (Okla. Crim. 1963); *Lee v. Commonwealth*, 200 Va. 233, 105 S.E.2d 152 (1959). *Contra*, *People v. Kenny*, 167 Misc. 51, 3 N.Y.S.2d 348 (Queens County Ct. 1938).

²⁴ 293 F. 1013 (D.C. Cir. 1923).

²⁵ *Id.* at 1014:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while the courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field to which it belongs.

²⁶ See generally Horvath & Reid, *Reliability of Polygraph Examiner Diagnosis of Truth and Deception*, 62 J. CRIM. L. 276 (1971); Burkey, *The Case Against the Polygraph*, 51 A.B.A.J. 855 (1965); Inbau & Reid, *The Lie Detector Technique, A Reliable and Valuable Investigative Aid*, 50 A.B.A.J. 470 (1964); Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie-Detection*, 70 YALE L.J. 694 (1961); Cureton, *A Consensus as to the Validity of Polygraph Procedures*, 22 TENN. L. REV. 728 (1953); Trovillo, *Scientific Proof of Credibility*, 22 TENN. L. REV. 743 (1953); Wicker, *The Polygraphic Truth Test and Law of Evidence*, 22 TENN. L. REV. 711 (1953).

should be whether the device or method is acceptable to a substantial body of scientific opinion.²⁷ He concludes that if the latter standard were applied, the polygraph and the polygraph technique would measure up satisfactorily.²⁸ Professors Inbau and Reid have asserted that in its present state of development, the accuracy and reliability of the polygraph technique compares quite favorably to other judicially recognized scientific techniques, such as psychiatric analysis, medical diagnosis and prognosis, and the scientific examination of questioned documents, fingerprinting, and handwriting.²⁹ In making these observations, the foregoing authorities have advocated the general admission in evidence of the results of properly conducted polygraph examinations.³⁰ These observations are quite relevant to the discussion here, for the reason that the argument is not advanced on behalf of admitting such evidence under any circumstances, but rather for limited admissibility pursuant to stipulation. In upholding the latter position, the *Valdez* decision expressly rejected the general admission of polygraph evidence.³¹

However, where there has been a stipulation, voluntarily agreed upon, the discretion of the court should be substituted for the rule of exclusion.³² The court's discretion in determining whether such evidence may be admitted should be exercised in accordance with flexible standards designed to maximize the probative value and minimize the potential dangers of expert testimony based upon the results of polygraph examinations. These standards should pertain specifically to the form and manner of stipulation, the prerequisites for admissibility, the mode of presenting such testimony, the purposes for which the evidence may be introduced and the weight and effect which should be accorded such evidence by the trier of fact.

The initial consideration is directed to the formal substance of the stipulation and the circumstances surrounding its execution in order to

²⁷ C. McCORMICK, EVIDENCE § 174 at 371 (1954).

²⁸ *Id.* See J. RICHARDSON, MODERN SCIENTIFIC EVIDENCE, § 10.6 (1961). *Contra*, Skolnick, *supra* note 26.

²⁹ INBAU & REID, *supra* note 17, at 255-56.

³⁰ *Id.* at 257:

The polygraph technique which we have described, when properly used by competent, experienced examiners, possesses a very high degree of accuracy. This we can conscientiously report from our experience in the examinations, personally, or in the supervision of the polygraph examinations, of over 35,000 subjects. It is our view, therefore, that the results of a competently conducted polygraph examination should be accepted as evidence.

³¹ *State v. Valdez*, 91 Ariz. at 280, 371 P.2d at 898:

Of course absolute infallibility is not the standard for admissibility of scientific evidence. But at this time it seems wise to demand greater standardization of the instrument, technique and examiner qualifications and the endorsement by a larger segment of the psychology and physiology branches of science before permitting general use of lie-detector evidence in court.

³² See C. McCORMICK, EVIDENCE § 174 at 373 (1954).

determine whether there has been a valid stipulation of admissibility.³³ Although many details of the agreement should be framed according to the particular case situation, the decisions in this area have indicated certain formal requirements considered essential to a valid stipulation. The first requirement is that the stipulation should be a formal, written document which has been signed by the defendant, his counsel, and the prosecuting attorney.³⁴ Oral stipulations, particularly where they are made without the advice of counsel, should not be enforced. The most obvious reason is the high potential for coercion and misunderstanding. In *People v. Zazzetta*,³⁵ the Supreme Court of Illinois rejected the admission of polygraph evidence pursuant to stipulation for the reason that such agreement was orally entered upon the record in response to questioning by the court.³⁶ The same result was reached by a Kentucky Court of Appeals in *Conley v. Commonwealth*,³⁷ which observed that more formality should be required to sustain the validity of an agreement of such importance. It is agreed that because of the admittedly extraordinary consequences of such an agreement the parties should manifest their precise understanding and intent in the form of a written document. For this reason, it is also necessary that the defendant be accorded at all stages of this process the advice of counsel. Furthermore, the agreement must be mutual in the sense that the persons who are party to and affected by the stipulation should agree to its terms.

The second essential element of the stipulation is that it must specifically provide for the defendant's voluntary submission to the polygraph examination and for the admission in evidence of the examiner's opinion based thereon as well as relevant material such as the graphic recording of defendant's reactions.³⁸ A stipulation of admissibility should

³³ See appendix *infra*, for a model stipulation form drawn in accordance with the standards discussed herein.

³⁴ *State v. Valdez*, 91 Ariz. at 283, 371 P.2d at 900.

³⁵ 27 Ill.2d 302, 189 N.E.2d 260 (1963).

³⁶ The questioning of defendant by the trial court in *People v. Zazzetta* proceeded as follows:

Q. Is it your desire to have the lie test?

A. Yes, sir.

* * * * *

Q. You heard the State's Attorney say in the event the result of the test is unfavorable to you, then you intend to enter a plea of guilty?

A. I didn't say that, no.

Q. Or put in another way, in the event that the test turns out to be unfavorable to you, and you still insist upon a jury trial, you are willing to stipulate in open Court that it will be perfectly proper for the State's Attorney to offer the result of the test in evidence on the trial of the case—you understand that clearly?

A. Yes, sir.

Q. And you are so stipulating now?

A. Yes, sir.

Id. at 305, 189 N.E.2d at 262.

³⁷ 306 S.W.2d 825 (Ky. 1957).

³⁸ *State v. Valdez*, 91 Ariz. at 283, 371 P.2d at 900.

not be implied where the agreement indicates only that defendant consented to submit to a polygraph examination.³⁹ It is essential to the validity of the stipulation that defendant understand that the results of such test may be admitted only pursuant to stipulation and he should be aware of the consequences if he so stipulates. As will be indicated in the discussion to follow, such stipulation will not be conclusive upon the admissibility of such evidence. The ultimate decision on this matter will be subject to the discretion of the court. However, the stipulation may be regarded as a prima facie indication that the parties have mutually assented to the admission of the polygraph evidence and that the nature and consequences of the stipulation were fully understood. Any agreement which does not specifically provide for the admission in evidence of the testimony and conclusions should not be enforced by the court.⁴⁰

Certain waiver provisions should also be included in the stipulation. First, there should be a provision for the knowing and intelligent waiver of the privilege against self-incrimination guaranteed by the Fifth Amendment,⁴¹ and for the defendant's voluntary submission to the polygraph examination. Whether the results of such tests are within the scope of the protection afforded by the Fifth Amendment has not been decided by the courts. The assertion has been made that this protection extends only to evidence of a testimonial nature and not to evidence of a physical nature derived from examination or tests.⁴² As indicated previously, the polygraph merely records graphically, physiological reactions which are related to the subject's responses to questions asked him during the examination. In *Schmerber v. California*,⁴³ the United States Supreme Court held that the admission in evidence of an analysis of blood withdrawn from a defendant charged with driving while intoxicated did not violate the privilege against self-incrimination for the reason that such evidence was neither communicative nor testimonial. On the basis of this and similar decisions,⁴⁴ one could argue that the results of polygraph tests are physical rather than testimonial in nature. However, the analogy of blood tests, handwriting samples, and line-up identifications to mechanical means of assessing truth or deception is quite tenuous and has

³⁹ See *State v. Walker*, 37 N.J. 208, 181 A.2d 1 (1962).

⁴⁰ See *State v. Lowry*, 163 Kan. 622, 185 P.2d 147 (1947). The Supreme Court of Kansas refused to decide the question of whether or not polygraph evidence could be admitted pursuant to stipulation for the reason that defendant had not agreed to the admission of such evidence at trial but merely consented to a polygraph examination. However, by way of dictum, the Court indicated that had there been a written stipulation of full admissibility, their holding might have been otherwise.

⁴¹ U.S. CONST. amend. V.

⁴² 8 J. WIGMORE, EVIDENCE § 2263 (McNaughton Rev. 1961); C. McCORMICK, EVIDENCE 266 (1954).

⁴³ 384 U.S. 757 (1966).

⁴⁴ See, e.g., *United States v. Wade*, 388 U.S. 218 (1967) (appearance in line-up); *Gilbert v. California*, 388 U.S. 263 (1967) (taking of handwriting sample).

not been drawn by the courts. The communicative elements inherent in the polygraph technique and the nature of the evidence which it produces may indeed compel observance of the right against testimonial compulsion.⁴⁵ Assuming, then, that an individual may have the right to refuse to submit to a polygraph examination by invoking the privilege against self-incrimination, we may also conclude that he may knowingly and intelligently waive this right.⁴⁶

In addition to the preceding waiver, the stipulation should further provide for the waiver of objection to the admissibility of such evidence on the basis of the traditional view of exclusion. The defendant should fully understand that such evidence may be admitted only if he so stipulates prior to the examination. Such a waiver should not, however, be so broadly construed as to foreclose any objection at trial based upon the competency, accuracy and reliability of the particular examination given defendant. Two pre-*Valdez* decisions affirming the admissibility of polygraph evidence pursuant to stipulation so held on the basis that all objections to reliability and accuracy were waived by virtue of the stipulation.⁴⁷ For the purposes of the procedure described herein, the stipulation should not so broadly foreclose any inquiry at trial regarding the competence of the evidence offered.

Although the foregoing requirements may be regarded as essential to valid stipulation, the true value of such an agreement lies in its detail pertaining to the examination itself. The stipulation approved by the Missouri court in *State v. Fields*⁴⁸ illustrates this point. That agreement specifically designated the individual who would administer the polygraph test and interpret the results. It further provided that the named examiner should, at trial, explain to the jury the nature of the test given, the questions asked and the answers given, the responses of the defendant as recorded by the polygraph and his conclusions, if any, formed on the basis of his analysis of the test results. Finally, the stipulation specified a list of questions pertaining to the crime which the defendant agreed to answer. In this respect, we may observe a salient reason for admitting polygraph testimony pursuant to stipulation. The parties may mutually select and designate in the terms of their agreement the individual or agency that is to give the test and testify at trial. The importance of examiner qualification and expertise has been noted previously. The

⁴⁵ See Skolnick, *supra* note 26.

⁴⁶ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁴⁷ *State v. McNamara*, 252 Iowa 19, 104 N.W.2d 568 (1960); *People v. Houser*, 85 Cal. App.2d 686, 193 P.2d 937 (1948). The California court in *Houser* concluded that: "It would be difficult to hold that defendant should now be permitted on this appeal to take advantage of any claim that such operator was not an expert and as to the results of the test such evidence was inadmissible, merely because it happened to indicate that he was not telling the truth." *Id.* at 695, 193 P.2d at 942.

⁴⁸ *State v. Fields*, 434 S.W.2d 507, 511 (Mo. 1968).

availability of expert polygraph examiners will be an important factor in deciding whether or not a stipulation of this nature will be entered. In addition the parties may, by the terms of their agreement, define the scope of the testimony that is to be presented, as well as the nature of the test which is to be administered. By designating those matters within the permissible range of inquiry during the test, the parties may further insure the relevance and probative value of the testimony to be presented. One of the effects of such a detailed stipulation of admissibility is that the parties may, in a sense, formulate the ground rules for the subsequent admission of such evidence at trial. In this manner, the defendant will be more fully aware of the consequences of his waiver and stipulation. Such understanding would not necessarily be achieved where these matters have been unilaterally determined without the consent and agreement of all the parties affected thereby. In addition to these matters, it should be further provided in the terms of the stipulation that the polygraph examiner may testify only where he has been able to reach a definite conclusion as to truth or deception.⁴⁹ Therefore, to insure the probative value of such testimony, inconclusive results should not be brought to the attention of the jury.

Once a valid stipulation has been entered by the parties, the inquiry should turn to the standards which guide the presentation of such evidence at trial. Especially where the testimony of the examiner is unfavorable to the defendant, we should consider whether due process of law, guaranteed by the Fourteenth Amendment,⁵⁰ is denied by admitting evidence of this nature. In order to insure the protections afforded by the Constitution, the challenge is to devise a procedure of admission which may be deemed "fundamentally fair" with respect to the rights of the accused.⁵¹ Perhaps the most significant qualification imposed by *Valdez* upon the offer of polygraph testimony at trial provides:

That notwithstanding the stipulation, the admissibility of the test results is subject to the discretion of the trial judge, *i.e.*, if the trial judge is not convinced that the examiner is qualified or that the test was conducted under proper conditions he may refuse to accept such evidence.⁵²

This limitation provides the keystone of the premise that, in the case of a valid stipulation of full admissibility, the rule of exclusion should be supplanted by the exercise of sound judicial discretion to determine the competency of polygraph evidence. Whenever evidence of this nature is offered by either the state or the defendant, the court should inquire, out of the presence of the jury, as to the validity of the stipulation, the

⁴⁹ See C. McCORMICK, EVIDENCE § 174 at 373 (1954).

⁵⁰ U.S. CONST. amend. XIV, § 1.

⁵¹ See, *e.g.*, *Rochin v. California*, 343 U.S. 165 (1952); *Lisenba v. California*, 314 U.S. 219 (1941).

⁵² *State v. Valdez*, 91 Ariz. at 283, 371 P.2d at 900.

administration of the test, the competence of the testimony to be offered, and the purposes for which it is to be offered.

The court should first determine whether the defendant voluntarily consented to be examined by means of a polygraph test and knowingly stipulated to the admissibility of evidence deduced therefrom. In the process of this determination the court should inquire as to whether the defendant voluntarily waived the right against self-incrimination and whether he was represented by competent counsel at the time the stipulation was entered. If these formal requirements for a valid stipulation have not been complied with, or the terms of the agreement have not been followed, the court should refuse to admit the testimony of the polygraph examiner.

If, however, these formal requirements have been met, the court should then consider whether the reliability of the test and the qualifications of the operator are sufficient to justify the admission of such evidence. At this stage the court should consider generally the foundation for such testimony that will be presented upon direct examination. If, after a searching inquiry into these matters, the court is convinced that the testimony of the polygraph examiner will be that of a qualified expert in the field, based upon a reasonably accurate and reliable method of testing in this particular case, and that the probative value of such testimony outweighs any prejudice that may result, the evidence should be admitted pursuant to the terms of the stipulation.⁵³ Conversely, if the proponent of the evidence has not so convinced the court, the stipulation should not be enforced.

Where the court concludes that the stipulation may be enforced, certain standards must be observed when the polygraph evidence is presented to the trier of fact. First, it should be held that the mere offer in evidence of a written report made by the polygraph examiner should not be permitted unless the examiner is present at trial to testify. In *People v. Potts*,⁵⁴ the Illinois court cited *Valdez* in holding inadmissible the written conclusions of the polygraph examiner where the examiner did not testify and the report made no mention of the examiner's qualifications. The most basic objections to such reports would be that they deny the adverse party the right of cross-examination and that they are inadmissible as hearsay. Since the reliability and accuracy of the polygraph technique is critically dependent upon the person conducting the test, that individual must be available for cross-examination regarding the method by which he arrived at his conclusions.

In presenting this testimony, the proponent should establish a sufficient foundation to inform the jury as to the examiner's expertise and

⁵³ C. McCORMICK, EVIDENCE § 174 at 373 (1954).

⁵⁴ 74 Ill. App.2d 301, 220 N.E.2d 251 (1966).

experience in applying the polygraph technique and in interpreting the results of such examinations. On this basis, the jury will be afforded the opportunity to effectively evaluate the conclusions of the examiner and to determine the proper weight and effect that should be accorded such evidence. The direct examination of the polygraph witness in *State v. Fields*⁵⁵ illustrates a desirable mode of presenting such evidence. The witness first testified as to his training and experience in the operation of the polygraph machine and in the application of the polygraph technique to interpret the results of such an examination.⁵⁶ He then proceeded to describe the mechanical operation and theory of the polygraph and explained that it contained instruments which recorded blood pressure, pulse, respiration and galvanic skin reaction.⁵⁷ The witness then gave a full explanation of the method of questioning, the questions asked, and the purpose of each question. The polygraph technique generally employs three types of questions: "norm" questions to which the subject will give a truthful response; "control" questions designed to elicit a deceptive response to establish an abnormal reaction; and the "critical" questions which pertain specifically to the matter of inquiry.⁵⁸ The witness in *Fields* then testified that the defendant showed abnormal physiological reactions on the polygraph when he responded to the "critical" questions that were propounded to him.⁵⁹ In conjunction with this testimony, the witness exhibited to the jury the graphic tracings of these reactions and explained their relation to the questions asked. At the discretion of the court these graphs may be admitted into evidence along with the testimony of the examiner.⁶⁰ On the basis of these results, the witness then stated his conclusion that the defendant was deceptive or attempting deception in his responses to the critical questions.

It is evident that the conclusions of the polygraph expert on the issue of truth or deception is the salient evidentiary feature of such testimony. Whether these conclusions will unduly influence the jury or usurp its role

⁵⁵ 434 S.W.2d 507 (Mo. 1968).

⁵⁶ Inbau & Reid, *supra* note 26, at 471, suggest that the examiner should have at least six months of intensive individual training under the guidance of an experienced polygraph examiner. This training should include instruction in relevant aspects of psychology and physiology as well as experience in the interpretation of numerous lie-detector test records in verified cases.

⁵⁷ The components of the particular polygraph machine which is used are important in determining its reliability in a case situation. Inbau & Reid state that any machine which does not accurately record respiration, blood pressure and pulse is wholly inadequate for the purpose of diagnosing truth or deception. *Id.* at 471.

⁵⁸ *Id.*

⁵⁹ In *State v. Fields*, 434 S.W.2d 507 (Mo. 1968), the stipulated and material questions concerned the commission of an armed robbery. The Court noted that the defendant was asked, "did . . . he participate in the robbery, did he point the gun at the men, was he guilty of the robbery, did he receive any of the money, and was he an accessory to the robbery." *Id.* at 511.

⁶⁰ *State v. Valdez*, 91 Ariz. at 283, 371 P.2d at 900.

as ultimate finder of fact⁶¹ will depend upon the nature of the conclusion that the witness is permitted to give. One of the dangers noted by the courts in sustaining the rule of exclusion is that the conclusion of the examiner may tend to be decisive upon the ultimate issue of guilt or innocence in a criminal case.⁶² To obviate the potential for prejudicial effect, the witness should not be permitted under any circumstances to give an opinion as to whether the subject is guilty of or was involved in the crime charged.⁶³

Upon completion of the direct testimony, it is essential that the adversely affected party be afforded the opportunity to fully cross-examine the polygraph examiner as to his qualifications and training, the conditions under which the test was administered, the limits upon and potential error in the polygraph technique and any other matters pertinent to the accuracy and reliability of the testimony.⁶⁴ This will enable counsel and jury to test the validity of the examiner's conclusions made on the basis of the tests given the defendant and to place his testimony in its proper perspective. The mere fact of stipulation and the decision of the court to admit such evidence should not preclude such inquiry. The scope of cross-examination may include questioning as to the various physiological and psychological factors as well as extraneous influences which may affect the results of the test. There might also be inquiry as to whether the defendant was suffering any such disabilities at the time the test was administered to him. If necessary, counsel should be permitted to inquire further into the precise basis for the examiner's interpretations and conclusions and to question the validity of the particular method employed.

Finally, our attention must focus upon the purposes for which this testimony should be considered by the jury and the manner in which they should be instructed regarding such testimony. The *Valdez* decision expressly limits the use of such testimony to the corroboration of other evidence of the defendant's participation in the crime, or, if the defendant testifies, to impeach his testimony.⁶⁵ Conversely, where the test results are favorable to the defendant, the evidence may be admitted for the purpose of corroborating the defendant's testimony and impeaching that of his accusers. In this respect, the jury should be so instructed. The instruction should also inform the jury that the conclusions of the polygraph witness do not prove or disprove any element of the crime but, at most, may only

⁶¹ See *State v. Cole*, 354 Mo. 181, 188 S.W.2d 43 (1945); *State v. Smith*, 113 Ohio App. 461, 178 N.E.2d 605 (1960).

⁶² See *State v. Hegel*, 9 Ohio App.2d 12, 222 N.E.2d 666 (1964); *Peterson v. State*, 247 S.W.2d 110 (Tex. Cr. 1951).

⁶³ *State v. Galloway*, 167 N.W.2d at 94. Subject to this qualification, the Iowa court approved the trial court's admission of polygraph testimony pursuant to stipulation.

⁶⁴ *State v. Valdez*, 91 Ariz. at 283, 371 P.2d at 901.

⁶⁵ *Id.* at 283, 371 P.2d at 900.

indicate whether or not the defendant was truthful or deceptive at the time of the examination and that the jury should decide, in light of all the evidence presented, the weight and effect that such evidence deserves.⁶⁶ Finally, the instruction should inform the jury that they may consider the testimony of the polygraph examiner only if they find that the defendant voluntarily consented to the examination and that his stipulation of admissibility was made with full knowledge of its nature and consequences.⁶⁷ Although flagrant abuses with regard to the preceding should be excluded by the court at the outset, the jury should also be permitted to consider this issue in their final deliberations.

The end result of the procedure described here is to present the trier of fact with expert opinion based upon the application of the polygraph technique to a defendant in a criminal proceeding. It is believed that this approach presents a viable alternative to the traditional view that such evidence may not be admitted under any circumstances. Its adoption would afford the defendant, as well as the state, the opportunity to draw upon this source of evidence if they deem it necessary to aid the difficult process of determining guilt or innocence. This procedure is not initiated unilaterally, but the admission of such evidence pursuant to stipulation is critically dependent upon the willingness of the defendant to submit to the polygraph examination. The effect of the stipulation is to waive the rule of exclusion and substitute a standard of judicial discretion. In so doing, the parties do not waive any and all objections to such evidence but rather the reliability and competence of the technique as applied is to be determined by the court.

The decision of whether or not to adopt the approach presented here must critically evaluate the potential value of polygraph evidence along with its potential dangers. In so doing, the courts of Ohio should determine whether a procedure may be devised to maximize the value and ameliorate the possible prejudices that may result. Observing that the polygraph technique of diagnosing truth and deception may significantly aid the difficult process of judicial fact-finding, Professor McCormick concludes: "We cannot in our hearts be so confident of the reliability of the present system of resolving conflicts in testimony by impeachment, cross-examination and inferences from demeanor, that we can afford to reject scientific aid in the task."⁶⁸

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⁶⁶ *Id.* at 283, 371 P.2d at 901.

⁶⁷ In *State v. Galloway*, 167 N.W.2d 89 (Iowa 1969), the instruction to the jury provided in part: "If you find that the defendant did not voluntarily submit the said polygraph or lie-detector test and did not consent that the person conducting said test might testify in court as to the results of said test, then you shall give no consideration to said test." *Id.* at 95.

⁶⁸ C. McCORMICK, EVIDENCE § 174 at 370 (1954).

APPENDIX

STIPULATION AND WAIVER FOR THE ADMISSION IN EVIDENCE OF POLYGRAPH TEST RESULTS

I, (name of subject), hereby voluntarily and willingly request and consent that I be given a polygraph ("lie-detector") examination by (examiner) on (date of examination) at (agency).

It is agreed and understood that during the course of said examination I will be required to answer the following questions pertaining to (crime charged) which occurred on (date of crime):

Four horizontal lines for listing questions.

It is further understood that under the Constitutions of this State and the United States, I have the right to remain silent and that by invoking the right to remain silent I may refuse to answer any questions, including those listed above, pertaining to the crime with which I have been charged, and further, that I cannot be required or compelled to submit to examination by the polygraph technique.

With full knowledge and understanding of these rights and immunities, it is my desire to voluntarily and willingly waive the right to remain silent and consent to submit to said examination. It is understood that I may invoke the right to remain silent at any time prior to the examination or during the examination. However, if, during the examination, I answer the questions asked me, I will be deemed to have waived the right to remain silent.

It is further understood that the results of said polygraph examination may not be admitted in evidence in a court of law without the mutual consent of myself and the State of _____. With full knowledge of the foregoing and with the understanding that the State of _____ is a party to this agreement it is stipulated and agreed that:

- 1. The polygraph or lie-detector examination will be conducted by (examiner) on (date of examination) at (agency).
2. Said examination will pertain to the (crime charged) which occurred on (date of crime) and I agree to answer the following questions,

Three horizontal lines for listing questions.

- 3. If, on the basis of the results of said examination, the examiner concludes that I have responded truthfully, his testimony as to such conclusion may be admissible in evidence along with the graphs and any other materials relevant to the examination, results and interpretation thereof.
4. However, it is understood that if the examiner concludes that I have responded in an untruthful manner, then his testimony as to such conclusion may be admissible in evidence on behalf of the State of _____ along with the graphs and any other

materials relevant to the examination, results and interpretation thereof.

5. If, on the basis of the results of said examination the examiner is unable to reach a conclusion satisfactory to himself as to whether my responses were truthful or deceptive then no evidence pertaining to said examination shall be presented at trial on behalf of myself or the State of _____.
6. The admission of such evidence in a court of law shall, notwithstanding this agreement, be subject to the discretion of the court. If such evidence is admitted, it shall be so admitted only for the purpose of corroborating and/or impeaching other evidence presented at trial and that the opportunity of full cross-examination will be permitted.

With full knowledge and understanding of the foregoing stipulations and waiver, the undersigned hereby agree and so stipulate.

(Defendant)

(Prosecuting Attorney)

(Counsel for Defendant)