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Polygraph Evidence: Part II

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Forensic Science: Polygraph Evidence: Part II

By Paul C. Giannelli*

This is the second of a two-part article on polygraph evidence. The first part examined scientific issues and procedures. This article focuses on legal issues.

The admissibility of polygraph evidence was first considered and rejected in *Frye v. United States*,[1] the 1923 case in which the D.C. Circuit established the general acceptance test for the admissibility of scientific evidence.[2] According to the court, the polygraph[3] had not gained general acceptance in the fields of psychology and physiology.[4] From *Frye* until the 1970s, polygraph evidence was overwhelmingly rejected by the courts.[5]

In the early 1970s several trial courts departed from nearly fifty years of precedent and admitted the results of unstipulated polygraph examinations. In *United States v. Ridling*,[6] a federal district court found that "the theory of the polygraph is sound" and "directly relevant" to the issue (i.e., perjury) being litigated.[7] The court went on to hold that the results of a polygraph examination conducted by a court-appointed expert would be admissible under certain conditions.[8] Polygraph results were also admitted in *United States v. Zeiger*.[9] The *Zeiger* court held that the "polygraph has been accepted by authorities in the field as being capable of producing highly probative evidence in a court of law when

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[1] 293 F. 1013 (D.C. Cir. 1923).

[2] The *Frye* case was overruled by the U.S. Supreme Court in 1993. Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993). *Daubert*, however, applies only to federal trials and did not involve polygraph evidence.

[3] The instrument used in *Frye* measured only one physiological response (i.e., blood pressure), whereas the modern polygraph measures respiration and galvanic skin resistance in addition to blood pressure. The technique also has been improved through the development of control questions, the pretest interview, and stimulation methods.

[4] Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

[5] People v. Kenny, 167 Misc. 51, 54, 3 N.Y.S.2d 348, 351 (Sup. Ct. 1938), is an exception to the general rule of exclusion. That case, however, was soon undercut by People v. Forte, 279 N.Y. 204, 206, 18 N.E.2d 31, 32 (1938), which reaffirmed the New York Court of Appeals' earlier position excluding the results of polygraph examinations.

[6] 350 F. Supp. 90 (E.D. Mich. 1972).

[7] *Id.* at 95.

[8] Admissibility was conditioned on the selection of a court-appointed expert and the expert's determination that the results indicated either truth or deception. If the appointed expert testified, the defendant's own expert would also be permitted to testify. *Id.* at 99.

[9] 350 F. Supp. 685 (D.D.C.), *rev'd*, 475 F.2d 1280 (D.C. Cir. 1972) (per curiam).

properly used by competent, experienced examiners."[10] In addition, in *People v. Cutter*[11] a California court admitted polygraph evidence during a suppression hearing after finding that the "polygraph now enjoys general acceptance among authorities, including psychologists and researchers . . . as well as polygraph examiners."[12] Several other courts also admitted polygraph evidence at this time.[13]

The trend in favor of admissibility that these cases seemed to forecast never developed. *Zeiger* was reversed per curiam,[14] while *Ridling* and *Cutter* were never appealed, thus precluding the opportunity for appellate approval. Nevertheless, the judicial approach to polygraph evidence seems to have been altered by these decisions and the attention that they received in the literature.[15] In particular, a number of courts admitted polygraph results upon stipulation after these decisions were rendered.

Generally, the cases can be divided into three groups. The first group consists of those courts that adhere to the traditional position, holding polygraph evidence per se inadmissible. A second group of courts admits polygraph evidence upon stipulation. Finally, a few courts entrust the admissibility of polygraph evidence to the discretion of the trial court.

Per Se Exclusion

A majority of jurisdictions follow the traditional rule, holding polygraph evidence inadmissible per se. This category includes both federal[16] and state courts.[17] In addition, the

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[10] *Id.* at 690.

[11] 12 Crim. L. Rptr. (BNA) 2133 (Cal. Super. Ct. Nov. 6, 1972).

[12] *Id.* at 2134.

[13] See United States v. Hart, 344 F. Supp. 522, 523–524 (E.D.N.Y. 1971); State v. Watson, 115 N.J. Super. 213, 218, 278 A.2d 543, 546 (Hudson Cty. Ct. 1971) (sentencing); Walter v. O'Connell, 72 Misc. 2d 316, 317, 339 N.Y.S.2d 386, 388 (Queens Civ. Ct. 1972) (civil case); In re Stenzel, 71 Misc. 2d 719, 336 N.Y.S.2d 839 (Niagara Cty. Fam. Ct. 1972) (civil case).

[14] United States v. Zeiger, 475 F.2d 1280 (D.C. Cir. 1972).

[15] See generally Tarlow, "Admissibility of Polygraph Evidence in 1975: An Aid in Determining Credibility in a Perjury-Plagued System," 26 Hastings L.J. 917 (1975); Note, "The Emergence of the Polygraph at Trial," 73 Colum. L. Rev. 1120 (1973); Note, "Pinocchio's New Nose," 48 N.Y.U. L. Rev. 339 (1973).

[16] E.g., United States v. A&S Council Oil Co., 947 F.2d 1128, 1133–1134 (4th Cir. 1991); United States v. Hunter, 672 F.2d 815, 817 (10th Cir. 1982); United States v. Skeens, 494 F.2d 1050, 1053 (D.C. Cir. 1974); Mil. R. Evid. 707.

See also Annotation, "Modern Status of Rule Relating to Admission of Results of Lie Detector (Polygraph) Test in Federal Criminal Trials," 43 A.L.R. Fed. 68 (1979).

[17] E.g., People v. Anderson, 637 P.2d 354, 358 (Colo. 1981); State v. Miller, 202 Conn. 463, 486, 522 A.2d 249, 260–261 (1987); People v. Baynes, 88 Ill. 2d 225, 244, 430 N.E.2d 1070, 1079 (1981); Harris v. State, 481 N.E.2d 382, 384 (Ind. 1985); Ice v. Commonwealth, 667 S.W.2d 671, 675 (Ky. 1984); State v. Catanese, 368 So. 2d 975, 981 (La. 1979); People v. Barbara, 400 Mich. 352, 359, 255 N.W.2d 171, 173 (1977); State v. Anderson, 379 N.W.2d 70, 79 (Minn. 1985), *cert. denied*, 476 U.S. 1141 (1986); Pennington v. State, 437 So. 2d 37, 40 (Miss. 1983); State v. Staat, 811 P.2d 1261, 1263 (Mont. 1991); State v. Biddle, 599 S.W.2d 182, 185 (Mo. 1980); State v. Grier, 307 N.C. 628, 645, 300 S.E.2d 351, 361 (1983); Birdsong v. State, 649 P.2d 786, 788 (Okla. Crim. App. 1982); State v. Lyon, 304 Or. 221, 231, 744 P.2d 231, 236 (1987); Commonwealth v. Brockington, 500 Pa. 216, 220, 455 A.2d 627, 629 (1983); State v. Watson, 248 N.W.2d 398, 399 (S.D. 1976); Romero v. State, 493 S.W.2d

exclusionary rule extends to evidence that a person was willing to take, took, or refused to take an examination.[18]

Some courts rely on the *Frye* general acceptance test as the basis for exclusion[19] but the application of this test raises several issues. According to *Frye*, psychology and physiology are the fields in which general acceptance must be achieved.[20] Several decisions have expanded the "field" to include polygraph examiners.[21] In *United States v. Alexander*,[22] however, the Eighth Circuit rejected this view, saying that "Experts in neurology, psychiatry and physiology may offer needed enlightenment upon the basic premises of polygraphy. Polygraphists often lack extensive training in these specialized sciences."[23]

A related issue concerns the extent to which the widespread use of the polygraph in law enforcement, security, and industrial activities may be considered evidence of general acceptance. Some courts accorded such evidence considerable weight,[24] while others ignored it.[25]

Still other courts reject *Frye* as the appropriate standard for determining the admissibility of scientific evidence but still exclude polygraph evidence.[26] The U.S. Supreme Court rejected *Frye* in 1993,[27] but this does not mean that the federal courts' approach to polygraph evidence will also change.

The principal argument against the admissibility of polygraph evidence is lack of reliability.[28] Several points are made on this score: the lack of empirical validation,[29] the numerous

206, 213 (Tex. Crim. App. 1973); Robinson v. Commonwealth, 231 Va. 142, 156, 341 S.E.2d 159, 167 (1986); State v. Frazier, 252 S.E.2d 39, 49 (W. Va. 1979); State v. Dean, 103 Wis. 2d 228, 279, 307 N.W.2d 628, 653 (1981).

[18] E.g., United States v. Murray, 784 F.2d 188, 188–189 (6th Cir. 1986) (comment about polygraph deliberately introduced by experienced FBI agent was prejudicial error). See generally Annotation, "Propriety and Prejudicial Effect of Informing Jury that Witness in Criminal Prosecution Has Taken Polygraph Test," 15 A.L.R. 4th 824 (1982).

[19] E.g., Kelley v. State, 288 Md. 298, 302, 418 A.2d 217, 219 (1980); People v. Barbara, 400 Mich. 352, 377, 255 N.W.2d 171, 181 (1977).

[20] Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

[21] See United States v. Zeiger, 350 F. Supp. 685, 689 (D.D.C.), *rev'd*, 475 F.2d 1280 (D.C. Cir. 1972); United States v. DeBetham, 348 F. Supp. 1377, 1388 (S.D. Cal.), *aff'd*, 470 F.2d 1367 (9th Cir. 1972), *cert. denied*, 412 U.S. 907 (1973); United States v. Wilson, 361 F. Supp. 510, 511 (D. Md. 1973).

[22] 526 F.2d 161 (8th Cir. 1975).

[23] *Id.* at 164 n.6.

[24] E.g., United States v. Piccinonna, 885 F.2d 1529, 1532 (11th Cir. 1989).

[25] E.g., United States v. Alexander, 526 F.2d 161 (8th Cir. 1975).

[26] E.g., State v. Catanese, 368 So. 2d 975, 979 (La. 1979); State v. Brown, 297 Or. 404, 416–417, 687 P.2d 751, 759 (1984).

[27] Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993).

[28] See United States v. Alexander, 526 F.2d 161, 166 (8th Cir. 1975) ("[W]e are still unable to conclude that there is sufficient scientific acceptability and reliability to warrant the admission of the results of such tests in evidence"); People v. Baynes, 88 Ill. 2d 225, 239, 430 N.E.2d 1070, 1076 (1981) ("[T]he primary obstacle in admission of polygraph evidence, stipulated to or not, has continually and consistently been the instrument's disputed scientific reliability").

[29] See United States v. Wilson, 361 F. Supp. 510, 514 (D. Md. 1973) ("incipient stage of experimental research"); People v. Monigan, 72 Ill. App. 3d 87, 96, 390 N.E.2d 562, 568 (1979) ("[T]he estimate of the degree of accuracy of polygraph tests seem[s] to come from polygraph examiners themselves").

uncontrollable factors involved in the examination,[30] the subjective nature of the deception determination,[31] and the absence of adequate standards for assessing the qualifications of examiners.[32] Even if the reliability of the technique is established, additional problems are cited as reasons for exclusion, for example, the danger that an opinion concerning the truthfulness of a witness will intrude too much into the jury's historic function of assessing credibility[33]; the danger that the jury will overvalue the expert's testimony[34]; and the possibility that the trial will degenerate into a time-consuming trial of the technique.[35]

Admission Upon Stipulation

A substantial minority of courts admit polygraph evidence upon stipulation of the parties.[36] For the most part, this result has been achieved by court decision,[37] although statutory

[30] See People v. Anderson, 637 P.2d 354, 359 (Colo. 1981) ("Several uncontrollable or unascertainable physiological and psychological responses may cause difficulty or error.").

[31] People v. Anderson, 637 P.2d 354, 360 (Colo. 1981) (The polygraph technique, "albeit based on a scientific theory, remains an art with unusual responsibility placed on the examiner"); People v. Monigan, 72 Ill. App. 3d 87, 98, 390 N.E.2d 562, 569 (1979) ("almost total subjectiveness surrounding the use of the polygraph and the interpretation of the results").

[32] See People v. Anderson, 637 P.2d 354, 360 (Colo. 1981) ("The absence of adequate qualification standards for the polygraph profession heighten[s] the possibility for grave abuse."); State v. Catanese, 368 So. 2d 975, 982 (La. 1979) (lack of judicial and legislative control over competence of examiners).

[33] See People v. Baynes, 88 Ill. 2d 225, 244, 430 N.E.2d 1070, 1079 (1981) ("A potential trial by polygraph is an unwarranted intrusion into the jury function."); State v. Davis, 407 So. 2d 702, 706 (La. 1981) ("usurps the jury's prerogative on a question involving credibility").

[34] See United States v. Alexander, 526 F.2d 161, 168 (8th Cir. 1975) ("When polygraph evidence is offered . . . , it is likely to be shrouded with an aura of near infallibility, akin to the ancient oracle of Delphi"); State v. Catanese, 368 So. 2d 975, 981 (La. 1979) ("trier of fact is apt to give almost conclusive weight to the polygraph expert's opinion").

Whether juries will be overawed by polygraph evidence is a matter of dispute. See generally Cavoukian & Heslegrave, "The Admissibility of Polygraph Evidence in Court: Some Empirical Findings," 4 Law & Hum. Behav. 117 (1980); Carlson, Pasano & Jannuzzo, "The Effect of Lie Detector Evidence on Jury Deliberations: An Empirical Study," 5 J. Police Sci. & Admin. 148 (1977); Markwart & Lynch, "The Effect of Polygraph Evidence on Mock Jury Decision-Making," 7 J. Police Sci. & Admin. 324 (1979).

[35] See People v. Barbara, 400 Mich. 352, 410, 255 N.W.2d 171, 196 (1977) ("possibility of bogging down trials with collateral matters, perhaps resulting in a trial of the polygraph, or a battle of experts"); State v. Grier, 307 N.C. 628, 643, 300 S.E.2d 351, 359–360 (1983) ("possibility that the criminal proceeding may degenerate into a trial of the polygraph machine").

[36] See generally Katz, "Dilemmas of Polygraph Stipulations," 14 Seton Hall L. Rev. 285 (1984).

[37] E.g., United States v. Piccinonna, 885 F.2d 1529, 1536 (11th Cir. 1989); Anderson v. United States, 788 F.2d 517, 519 (8th Cir. 1986); Brown v. Darcy, 783 F.2d 1389, 1397 (9th Cir. 1986); Ex parte Clements, 447 So. 2d 695, 698 (Ala. 1984); State v. Valdez, 91 Ariz. 274, 283, 371 P.2d 894, 900 (1962); Holcomb v. State, 268 Ark. 138, 139, 594 S.W.2d 22, 23 (1980); State v. Chambers, 240 Ga. 76-77, 239 S.E.2d 324, 325 (1977); State v. Fain, 116 Idaho 82, 86, 774 P.2d 252, 256–257, *cert. denied*, 493 U.S. 917 (1989); State v. Marti, 290 N.W.2d 570, 586–587 (Iowa

provisions may accomplish the same result.[38] At one time the trend toward admissibility by stipulation appeared so strong that it seemed only a matter of time before it became the majority rule. Later decisions, however, cast doubt on this possibility. Indeed, several courts that initially admitted polygraph evidence upon stipulation have overruled their earlier decisions and now hold polygraph evidence per se inadmissible.[39]

Courts rejecting the admissibility of stipulated examinations argue that the stipulation does nothing to enhance the reliability of polygraph evidence, which is the principal reason for exclusion.[40] According to some courts the answer to this objection is that admissibility does not derive "from the fact that the stipulation somehow imbues the evidence with reliability . . . but from the fact that the parties are estopped, by their stipulated waiver of the right to object, from asserting the unacceptability of the evidence."[41] Other courts that accept stipulated results recognize, at least implicitly, that the technique possesses some degree of validity—at least when the results are admitted under controlled conditions designed both to ensure that the examination is properly administered by a competent examiner and to limit the purpose of admissibility.[42] Finally, some

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1980); Corbett v. State, 584 P.2d 704, 707 (Nev. 1978); State v. Souel, 53 Ohio St. 2d 123, 133–134, 372 N.E.2d 1318, 1323–1324 (1978); State v. Rebeterano, 681 P.2d 1265, 1268–1269 (Utah 1984).

See generally Annotation, "Admissibility of Lie Detector Test Taken Upon Stipulation That the Results Will Be Admissible in Evidence," 53 A.L.R.3d 1005 (1973).

[38] See Cal. Evid. Code § 351.1 (West Supp. 1992): "Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding . . . unless all parties stipulate to the admission of such results." See also People v. Kegler, 197 Cal. App. 3d 72, 90, 242 Cal. Rptr. 897, 909 (1987) (stipulation statute does not violate defendant's constitutional rights).

[39] See State v. Grier, 307 N.C. 628, 645, 300 S.E.2d 351, 356–361 (1983), overruling State v. Milano, 297 N.C. 485, 256 S.E.2d 154 (1979); Fulton v. State, 541 P.2d 871, 872 (Okla. Crim. App. 1975), overruling Castleberry v. State, 522 P.2d 257 (Okla. Crim. App. 1974), and Jones v. State, 527 P.2d 169 (Okla. Crim. App. 1974); State v. Dean, 103 Wis. 2d 228, 279, 307 N.W.2d 628, 653 (1981), overruling State v. Stanislawski, 62 Wis. 2d 730, 216 N.W.2d 8 (1974).

[40] See Pulakis v. State, 476 P.2d 474, 479 (Alaska 1970); State v. Grier, 307 N.C. 628, 642, 300 S.E.2d 351, 359 (1983); Commonwealth v. Brockington, 500 Pa. 216, 220, 455 A.2d 627, 629 (1983).

See also People v. Monigan, 72 Ill. App. 3d 87, 88, 390 N.E.2d 562, 563 (1979) (stipulation rejected as contrary to public policy and as an invalid stipulation of law).

[41] Wynn v. State, 423 So. 2d 294, 299 (Ala. Crim. App. 1982). Accord State v. Marti, 290 N.W.2d 570, 586–587 (Iowa 1980) (estoppel); State v. Rebeterano, 681 P.2d 1265, 1269 (Utah 1984) (estoppel).

[42] E.g., United States v. Oliver, 525 F.2d 731, 736 (8th Cir. 1975) ("We believe the necessary foundation can be constructed through testimony showing a sufficient degree of acceptance of the science of polygraphy by experienced practitioners in polygraphy and other related experts"), *cert. denied*, 424 U.S. 973 (1976); State v. Valdez, 91 Ariz. 274, 283, 371 P.2d 894, 900 (1962) (polygraphy "has been developed to a state in which its results are probative enough to warrant admissibility upon stipulation").

courts justify admission on a combination of these grounds.[43]

The legal theory recognized for admission of stipulated results may be critical. The waiver or estoppel theory could permit the prosecution to introduce polygraph results in its case-in-chief unless the stipulation limits admissibility to impeachment. In contrast, courts permitting admission of stipulated results under controlled conditions typically limit admissibility to credibility, with the result that the evidence is admissible only if the defendant testifies.

Conditions for Admission

The leading case on admissibility by stipulation is *State v. Valdez*,[44] in which the Arizona Supreme Court held that stipulated polygraph results are admissible if the following conditions are met:

(1) That the county attorney, defendant and his counsel all sign a written stipulation providing for defendant's submission to the test and for the subsequent admission at trial of the graphs and the examiner's opinion thereon on behalf of either defendant or the state.

(2) 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.

(3) That if the graphs and examiner's opinion are offered in evidence the opposing party shall have the right to cross-examine the examiner respecting:

a. the examiner's qualifications and training;

b. the conditions under which the test was administered;

c. the limitations of and possibilities for error in the technique of polygraphic interrogation; and

d. at the discretion of the trial judge, any other matter deemed pertinent to the inquiry.

(4) That if such evidence is admitted the trial judge should instruct the jury that the examiner's testimony does not tend to prove or disprove any element of the crime with which a defendant is charged but at most tends only to indicate that at the time of the examination defendant was not telling the truth. Further, the jury members should be instructed that it is for them to determine what corroborative weight and effect such testimony should be given.[45]

The *Valdez* conditions have been adopted by many of the courts that admit stipulated polygraph results.[46] Several courts have altered the conditions. For example, an oral agreement in open court in lieu of a written agreement is recognized by some courts.[47] In addition, a warning that the defendant is waiving the right against self-incrimination may also be required.[48]

Interpretation of Stipulation

The interpretation of stipulations has raised a number of issues,[49] and

[43] See State v. Renfro, 96 Wash. 2d 902, 906–907, 639 P.2d 737, 739, *cert. denied*, 459 U.S. 842 (1982).

[44] 91 Ariz. 274, 371 P.2d 894 (1962).

[45] *Id.* at 283–284, 371 P.2d at 900–901.

[46] E.g., Wynn v. State, 423 So. 2d 294, 300 (Ala. Crim. App. 1982); State v. Souel, 53 Ohio St. 2d 123, 134, 372 N.E.2d 1318, 1323 (1978).

[47] See Wynn v. State, 423 So. 2d 294, 299 (Ala. Crim. App. 1982); State v. Marti, 290 N.W.2d 570, 587 (Iowa 1980).

[48] See Wynn v. State, 423 So. 2d 294, 299 (Ala. Crim. App. 1982).

[49] E.g., Young v. State, 387 So. 2d 512–513 (Fla. Dist. Ct. App. 1980) (ex-

the cases highlight the importance of drafting the stipulation with care. For example, an agreement to admit the results of a polygraph examination conducted by a competent examiner does not encompass an examination by an examiner who is not licensed under the applicable state statute.[50] An agreement to admit the results of an examination permits the prosecution to use the results in its case-in-chief in the absence of a statement limiting the results to impeachment.[51]

Moreover, some courts have held that the agreement must be strictly construed; thus, when the state failed to comply with a stipulation that required the defense attorney to review all questions, the examination results were inadmissible.[52] The argument for construing a stipulation strictly against the state is based on constitutional grounds: "Where an accused waives his constitutional right to remain silent in exchange for an agreement that his statements will not be used under certain conditions which are fulfilled, the bargain made by the State will be enforced."[53]

perts in addition to examiner not permitted to testify because their testimony was not part of the stipulation); Porterfield v. State, 150 Ga. App. 303, 257 S.E.2d 372, 373 (1979) (testimony concerning inconclusive results not admissible because not part of the stipulation).

[50] Holcomb v. State, 268 Ark. 138, 140, 594 S.W.2d 22, 23 (1980); State v. Tavernier, 27 Or. App. 115, 118, 555 P.2d 481, 482 (1976).

[51] White v. State, 269 Ind. 479, 483–484, 381 N.E.2d 481, 484–485 (1978); State v. Baskerville, 139 N.J. Super. 389, 394, 354 A.2d 328, 330 (1976).

[52] Chambers v. State, 146 Ga. App. 126, 128, 245 S.E.2d 467, 469 (1978).

[53] State v. Fuller, 387 So. 2d 1040, 1041–1042 (Fla. Ct. App. 1980).

Ineffective Assistance of Counsel

In *People v. Reeder*[54] the court held that a defense counsel "who, in advance of the examination, stipulates that a defendant will submit to a polygraph examination and the results will be admissible at trial demonstrates incompetence."[55] This decision was subsequently vacated and the defendant's incompetency claim rejected.[56] Later cases also reject such claims. For example, in one case the court held that when counsel agrees to an examination after the defendant insists on his innocence, there is no incompetence.[57]

In *Houston v. Lockhart*[58] the Eighth Circuit found ineffective assistance of counsel where the defense attorney failed to have an oral stipulation reduced to writing and then failed to raise the issue at trial after the prosecutor reneged on the agreement.

Discretionary Admission

A few courts recognize a trial court's discretion to admit polygraph evidence even in the absence of a stipulation.[59] The Seventh Circuit has

[54] 129 Cal. Rptr. 646 (1976).

[55] *Id.* at 648.

[56] People v. Reeder, 65 Cal. App. 3d 235, 135 Cal. Rptr. 421 (1976).

[57] People v. Berry, 118 Cal. App. 3d 122, 134, 173 Cal. Rptr. 137, 143, *cert. denied*, 454 U.S. 966 (1981). See also State v. Sloan, 226 N.J. Super. 605, 612–614, 545 A.2d 230, 233–234 (A.D. 1988); Annotation, "Adequacy of Defense Counsel's Representation of Criminal Client Regarding Hypnosis and Truth Tests," 9 A.L.R. 4th 354 (1981).

[58] 982 F.2d 1246, 1251–1252 (8th Cir. 1993).

[59] The following trial courts have admitted polygraph evidence at a criminal trial without a stipulation. United States v. Ridling, 350 F. Supp. 90, 99 (E.D. Mich. 1972); People v. Daniels, 422 N.Y.S.2d 832, 837 (Sup. Ct. 1979).

adopted this approach.[60] In most cases, however, trial courts exercise this discretion by excluding polygraph evidence.

The leading federal case is *United States v. Piccinonna*,[61] in which the Eleventh Circuit, sitting en banc, ruled that polygraph evidence was admissible under certain circumstances, even in the absence of a stipulation. The court based its decision on a number of factors:

> Since the *Frye* decision, tremendous advances have been made in polygraph instrumentation and technique. Better equipment is being used by more adequately trained polygraph administrators. Further, polygraph tests are used extensively by government agencies. Field investigative agencies such as the FBI, the Secret Service, military intelligence and law enforcement agencies use the polygraph. Thus, even under a strict adherence to the traditional *Frye* standard, we believe it is no longer accurate to state categorically that polygraph testing lacks general acceptance for use in all circumstances.[62]

The court went on to specify several conditions for admissibility. Polygraph evidence is admissible to impeach or corroborate the testimony of a witness if (1) adequate notice is provided; (2) the opposing side has the opportunity to conduct its own test; and (3) the requirements of the Federal Rules of Evidence are satisfied—for example, corroboration is permissible only after impeachment. Even if all three conditions are met, the decision on admissibility is entrusted to the discretion of the trial court. The trial court may reject the evidence because the examiner was not qualified, the test was poorly administered, or the questions were improper. On remand, the trial court excluded the evidence because the questions and answers were irrelevant, and any probative value was outweighed by the danger of misleading the jury.[63]

Of the state jurisdictions, New Mexico has gone the furthest in admitting polygraph evidence. In *State v. Dorsey*[64] the New Mexico Supreme Court held that polygraph results were admissible if (1) the operator is qualified; (2) the testing procedures were reliable; and (3) the test of the particular subject was valid.[65] Currently, New Mexico Evidence Rule 707 governs admissibility. This rule permits the admissibility of polygraph evidence in the discretion of the trial court under the following conditions. First, the examination must be conducted by a qualified examiner. Minimum qualifications include five years' experience administering or interpreting examinations or equivalent academic training and at least twenty hours of continuing education during the twelve months prior to the examination offered in evidence.[66] Second, the examination must include at least two relevant questions, at least three charts, and be quantitatively scored.[67] Moreover, the pretest interview and actual testing must be recorded on an audio or video recording device.[68] Third, the

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[60] E.g., United States v. Dietrich, 854 F.2d 1056, 1059 (7th Cir. 1988); United States v. Tucker, 773 F.2d 136, 141 (7th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986).

[61] 885 F.2d 1529 (11th Cir. 1989).

[62] *Id.* at 1532.

[63] United States v. Piccinonna, 729 F. Supp. 1336 (D.C. Fla. 1990).

[64] 88 N.M. 184, 539 P.2d 204 (1975).

[65] *Id.* at 184–185, 539 P.2d at 205.

[66] N.M. Evid. R. 707(b).

[67] N.M. Evid. R. 707(c).

[68] N.M. Evid. R. 707(e).

party intending to offer the evidence generally must provide thirty-day written notice to the other party, including copies of the examiner's report, each chart, the audio or video recording of the pretest interview and actual testing, and a list of any prior examinations taken by the subject.[69]

At one time Massachusetts also admitted polygraph evidence without stipulation. In *Commonwealth v. A Juvenile* (1974)[70] the Supreme Judicial Court of Massachusetts held polygraph evidence admissible if the defendant agreed in advance to the admission of test results and the trial judge conducted a "close and searching inquiry" into the qualifications of the examiner, the methods employed in the examination, and the suitability of the defendant for testing.[71] In 1989, however, the court abruptly abandoned the position it had adopted in *A Juvenile* and ruled polygraph evidence inadmissible in criminal trials.[72] According to the court, the "failure of the basic theory of polygraphy to have gained general acceptance among physiological and psychological authorities"[73] required it to reevaluate its position.

In 1987 the Court of Military Appeals ruled that polygraph evidence was admissible in the discretion of the trial judge.[74] In 1991, however, Military Rule of Evidence 707(a) abrogated this decision. The rule reads: "Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence."[75]

Constitutional Arguments

Several constitutional arguments have been advanced to support the admissibility of polygraph evidence. First, defendants have argued that the constitutional right to present a defense includes the right to introduce favorable polygraph results. Second, defendants also have argued for a constitutional right to impeach prosecution witnesses if these witnesses have failed government-administered examinations.

Right to Present a Defense

The most common argument focuses on an accused's right to present a defense.[76] In *State v. Dorsey*[77] a New Mexico appellate court reversed a trial court's exclusion of polygraph evidence, holding that a defendant has a due process right to present critical and reliable defense evidence. In *Jackson v. Garrison*[78] a federal district court held that the exclusion of polygraph evidence denied a defendant a fair trial. In *State v. Sims*[79] an Ohio trial court found an implied right to present defense evidence in the compulsory process guarantee that, it concluded, compelled the ad-

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[69] N.M. Evid. R. 707(d).

[70] 365 Mass. 421, 313 N.E.2d 120 (1974).

[71] *Id.* at 426, 313 N.E.2d at 124.

[72] Commonwealth v. Mendes, 406 Mass. 201, 547 N.E.2d 35 (1989).

[73] *Id.* at 201, 547 N.E.2d at 35–36.

[74] United States v. Gipson, 24 M.J. 246, 253–254 (C.M.A. 1987).

[75] Mil. R. Evid. 707.

[76] See generally Clinton, "The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials," 9 Ind. L. Rev. 713, 810–815 (1976).

[77] 87 N.M. 323, 532 P.2d 912, 914–915 (N.M. App.), *aff'd on other grounds*, 88 N.M. 184, 539 P.2d 204 (1975).

[78] 495 F. Supp. 9 (W.D.N.C. 1979), *rev'd*, 677 F.2d 371 (4th Cir. 1981).

[79] 52 Ohio Misc. 31, 32, 369 N.E.2d 24, 46 (C.P. 1977).

mission of defense polygraph evidence. The precedential value of these cases, however, is not strong. *Jackson* was overruled on appeal,[80] *Dorsey* was affirmed but not on constitutional grounds,[81] and *Sims* is inconsistent with later Ohio cases.[82]

The right to present defense evidence also was cited in *McMorris v. Israel,*[83] in which the defendant offered to stipulate to the admission of a polygraph examination. Although stipulated polygraph results were admissible under state law at that time,[84] the prosecutor, without offering any reasons, refused to stipulate. In granting habeas corpus relief, the Seventh Circuit wrote: "Where credibility is as critical as in the instant case, the circumstances are such as to make the polygraph evidence materially exculpatory within the meaning of the Constitution."[85] The court, however, rested its decision on narrower grounds; that is, the prosecution's refusal to stipulate without offering a valid ground for the refusal deprived the defendant of due process: "From all that appears, [the prosecutor] was acting solely for tactical reasons in the belief that a test would not be helpful to his case. If the prosecutor refuses and states reasons, it then becomes the duty of the court to determine whether the reasons offered rise above the purely tactical considerations present in a given case."[86]

The response to *McMorris* has been chilly. Chief Justice Rehnquist characterized *McMorris* as a "dubious constitutional holding."[87] Some courts simply reject the argument that the prosecution is required to provide reasons for its refusal to stipulate.[88] Other courts reject the broader proposition that there is a constitutional right to present polygraph evidence.[89] Moreover, the Seventh Circuit itself has noted that *McMorris* applies only where a jurisdiction accepts stipulated polygraph results[90] and does not change a trial court's discretionary authority to exclude polygraph evidence.[91]

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[80] Jackson v. Garrison, 677 F.2d 371 (4th Cir. 1981).

[81] State v. Dorsey, 88 N.M. 184, 539 P.2d 204 (1975).

[82] Although the Ohio Supreme Court accepted the admission of stipulated polygraph results in State v. Souel, 53 Ohio St. 2d 123, 132, 372 N.E.2d 1318, 1323 (1978), it rejected the constitutional arguments for admission in State v. Levert, 58 Ohio St. 2d 213, 215, 389 N.E.2d 848, 850 (1979).

[83] 643 F.2d 458 (7th Cir. 1981), *cert. denied*, 455 U.S. 967 (1982).

[84] At the time *McMorris* was tried, Wisconsin admitted stipulated polygraph results. After the Seventh Circuit decision, the Wisconsin Supreme Court overruled its prior decision and held polygraph evidence per se inadmissible. State v. Dean, 103 Wis. 2d 228, 279, 307 N.W.2d 628, 653 (1981).

[85] McMorris v. Israel, 643 F.2d 458, 462 (7th Cir. 1981).

[86] *Id.* at 466.

[87] Israel v. McMorris, 455 U.S. 967, 970 (1982) (Rehnquist, J., dissenting from denial of certiorari).

[88] See Jones v. Weldon, 690 F.2d 835, 838 (11th Cir. 1982).

[89] E.g., Bashor v. Risley, 730 F.2d 1228, 1238 (9th Cir. 1984); United States v. Gordon, 688 F.2d 42, 44 (8th Cir. 1982); Milano v. Garrison, 677 F.2d 374, 375 (4th Cir. 1981); Jackson v. Garrison, 677 F.2d 371, 373 (4th Cir. 1981); United States v. Glover, 596 F.2d 857, 867 (9th Cir.), *cert. denied*, 444 U.S. 860 (1979).

[90] United States v. Black, 684 F.2d 481, 483 (7th Cir.), *cert. denied*, 459 U.S. 1043 (1982).

[91] United States v. Feldman, 711 F.2d 758, 767 (7th Cir.), *cert. denied*, 464 U.S. 939 (1983); United States v. Lupo, 652 F.2d 723, 729 (7th Cir. 1981), *cert. denied*, 457 U.S. 1135 (1982).

Impeachment of Prosecution Witnesses

In *United States v. A&S Council Oil Co.*[92] the defendant sought "a Confrontation Clause exception to the general inadmissibility of polygraph results to accommodate an accused's attacks on the credibility of key government witnesses."[93] The prosecution witness had entered into a plea agreement with the government that required the witness to take a polygraph examination if requested by the prosecution. The witness also agreed that the results were admissible against him in a court of law. The witness thereafter failed two polygraph examinations. The defense sought to introduce these examinations as impeachment evidence. Although the Fourth Circuit acknowledged that the facts of the case were "compelling," it felt bound by its prior decisions that had excluded polygraph results.[94] Accordingly, the court rejected an "exculpatory use" exception for polygraph evidence.

A similar issue was raised in *United States v. Hart*,[95] in which the court ruled that a prosecution witness's polygraph results, which indicated deception, were admissible under *Brady v. Maryland*.[96] The court interpreted *Brady* as requiring the disclosure of "any evidence which may tend to exculpate a defendant."[97] Since the prosecution initially thought the polygraph sufficiently reliable to conduct an examination, it had the burden, according to the court, of explaining why the test results should be excluded at trial.

Subsequent cases, however, have generally rejected this reasoning.[98] For example, in *United States v. MacEntee*,[99] the court commented:

> The *Hart* court makes an incorrect logical leap. *Brady* . . . stands for the principal [sic] that the constitution requires the government to turn over exculpatory information to the defense. Once the government turns over such information, however, the question of whether it may be introduced at trial is governed by the Federal Rules of Evidence, not by *Brady*.[100]

Proceedings Other Than Trial

Courts have admitted polygraph evidence at suppression hearings,[101] sentencing hearings,[102] motions for new trial proceedings,[103] and prison

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[92] 947 F.2d 1128 (4th Cir. 1991).

[93] *Id.* at 1133.

[94] "The broad exception Council seeks to create for an accused's attacks on government witnesses would . . . conflict with [our] precedents." *Id.* at 1134.

[95] 344 F. Supp. 522 (E.D.N.Y. 1971).

[96] 373 U.S. 83 (1963).

[97] United States v. Hart, 344 F. Supp. 522, 523 (E.D.N.Y. 1971).

[98] E.g., People v. Price, 1 Cal. 4th 324, 419, 821 P.2d 610, 663, 3 Cal. Rptr. 106, 159 (1991); State v. Waff, 373 N.W.2d 18, 25 (S.D. 1985); Robinson v. Commonwealth, 231 Va. 142, 156, 341 S.E.2d 159, 167 (1986); State v. Young, 89 Wash. 2d 613, 622–623, 574 P.2d 1171, 1177, *cert. denied*, 439 U.S. 870 (1978).

[99] 713 F. Supp. 829 (E.D. Pa. 1989).

[100] *Id.* at 831.

[101] People v. Cutter, 12 Crim. L. Rep. (BNA) 2133 (Cal. Super. Ct. Nov. 6, 1972); People v. McKinney, 137 Mich. App. 110, 115, 357 N.W.2d 825, 828 (1984).

[102] State v. Jones, 110 Ariz. 546, 551, 521 P.2d 978, 983, *cert. denied*, 419 U.S. 1004 (1974); State v. Watson, 115 N.J. Super. 213, 218, 278 A.2d 543, 546 (1971).

[103] State v. Catanese, 368 So. 2d 975, 982–983 (La. 1979); People v. Barbara, 400 Mich. 352, 412–414, 255 N.W.2d 171, 197–199 (1977); People v. Snell, 118 Mich. App. 750, 768, 325 N.W.2d 563, 572 (1982).

disciplinary hearings.[104] They have also ruled that polygraph evidence may be considered in determining probable cause.[105]

Some of these courts distinguish such proceedings from the trial itself. For example, the Michigan Supreme Court has held polygraph evidence admissible on a motion for a new trial, although the same evidence is inadmissible at trial.[106] According to the court, polygraph results may be of some assistance to the trial judge in deciding issues that typically arise in proceedings to determine whether a new trial should be granted: "Traditionally, the testimony of recanting or suddenly discovered witnesses has been highly suspect, largely because it is impossible to determine when the truth is being told. The polygraph won't do this either; not even its most ardent proponents would so contend. But it might help."[107] The court also commented that admissibility in this context would provide an "opportunity to test [the] effectiveness of the polygraph."[108]

Fifth Amendment

In *Schmerber v. California*[109] the U.S. Supreme Court indicated, albeit in dictum, that compelled submission to a polygraph test would violate the Fifth Amendment's prohibition against compelled self-incrimination:

> Some tests seemingly directed to obtain "physical evidence," for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment.[110]

The courts that have admitted polygraph evidence have recognized the applicabiity of the privilege in this context: "The polygraph results are essentially testimonial in nature and therefore a defendant could not be compelled initially to take such an examination on the Commonwealth's motion."[111] The protection of the privilege also extends to any comment by the prosecution that a defendant had refused to submit to an examination.[112] The defendant, however, may waive the privilege.[113]

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[104] Toussaint v. McCarthy, 926 F.2d 800, 803 (9th Cir.), *cert. denied*, 112 S. Ct. 213 (1990); Lenea v. Lane, 882 F.2d 1171, 1174 (7th Cir. 1989).

[105] Bennett v. Grand Prairie, 883 F.2d 400, 405–406 (5th Cir. 1989); State v. Coffey, 309 Or. 342, 345–347, 788 P.2d 424, 425–427 (1990); State v. Cherry, 61 Wash. App. 301, 810 P.2d 990, 942–943 (1991).

[106] People v. Barbara, 400 Mich. 352, 411–414, 255 N.W.2d 171, 197–198 (1977).

[107] *Id.* at 415, 255 N.W.2d at 199.

[108] *Id.*

[109] 384 U.S. 757 (1966).

[110] *Id.* at 764.

[111] Commonwealth v. A Juvenile, 365 Mass. 421, 431, 313 N.E.2d 120, 127 (1974).

[112] See Bowen v. Eyman, 324 F. Supp. 339, 341 (D. Ariz. 1970); MacDonald v. State, 164 Ind. App. 285, 293–294, 328 N.E.2d 436, 441 (1975).

[113] See Fernandez v. Rodriguez, 761 F.2d 558, 562 (10th Cir. 1985) (agreement to stipulate to admission of polygraph results was not a valid waiver of privilege against self-incrimination); United States v. Oliver, 525 F.2d 731, 734–736 (8th Cir. 1975), *cert. denied*, 424 U.S. 973 (1976); United States v. Ridling, 350 F. Supp. 90, 97 (E.D. Mich. 1972).

Confessions

It is not uncommon for a defendant to make an incriminatory statement before, during, or after a polygraph examination. Since polygraph examinations involve testimonial evidence under the Fifth Amendment privilege, the admissibility of statements made during the examination process often are subject to *Miranda* warnings.[114] *Miranda* warnings, however, are required only if the defendant is in custody[115] and is interrogated.[116] A person who is not under arrest and who voluntarily agrees to take the examination is not "in custody."[117] Moreover, the defendant may waive his right to remain silent and to counsel when he agrees to take a polygraph examination.[118]

Even if the defendant initially asserts his right to counsel after receiving *Miranda* warnings, he may subsequently waive that right by initiating conversations with the police, including a request for a polygraph examination.[119] In *Wyrick v. Fields*[120] the Supreme Court held that statements made by a defendant during a post-test interview were admissible where the defendant, who was represented by counsel, requested a polygraph examination and was informed of his *Miranda* rights. The Court rejected the argument that new warnings were required prior to the post-test interview. However, not all statements that are made after an examination are necessarily admissible; they are admissible only if the defendant voluntarily and knowingly waives his rights to remain silent and to counsel.[121]

In addition to Fifth Amendment *Miranda* rights, a defendant's admissions during a polygraph examination may be excluded from evidence if they are obtained in violation of the Sixth Amendment right to counsel[122] or are involuntary under the due process clause.[123] Moreover, some courts have held that polygraph evidence is admissible for the limited purpose of showing the voluntariness of a confession.[124]

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[114] Miranda v. Arizona, 384 U.S. 436 (1966). See also United States v. Little Bear, 583 F.2d 411, 414 (8th Cir. 1978) (tailoring *Miranda* warnings for polygraph examinations).

[115] See Berkemer v. McCarty, 468 U.S. 420 (1984).

[116] See Rhode Island v. Innis, 446 U.S. 291 (1980).

[117] See Jenner v. Smith, 982 F.2d 329, 334–335 (8th Cir.) (defendant not in custody at time incriminating statements made in response to examiner's statement that defendant had shown deception on polygraph test), *cert. denied*, 114 S. Ct. 81 (1993).

[118] See United States v. Iron Thunder, 714 F.2d 765, 771–772 (8th Cir. 1983); Henry v. Dees, 658 F.2d 406, 408 (5th Cir. 1981) (waiver invalid where examiner asked questions of a mentally retarded defendant that went beyond agreement to take examination).

[119] See Oregon v. Bradshaw, 462 U.S. 1039 (1983).

[120] 459 U.S. 42 (1982).

[121] See United States v. Gillyard, 726 F.2d 1426, 1429–1430 (9th Cir. 1984) (defendant did not validly waive right to a post-test interrogation by officers other than the examiner).

[122] See Barrera v. Young, 794 F.2d 1264, 1271–1272 (7th Cir. 1986) (right to counsel waived); Fields v. Wyrick, 706 F.2d 879, 880–881 (8th Cir. 1983) (same).

[123] See Barrera v. Young, 794 F.2d 1264, 1271–1272 (7th Cir. 1986) (confession during polygraph exam not involuntary). See generally Annotation, "Admissibility in Evidence of Confession Made by Accused in Anticipation of, During, or Following Polygraph Examination," 89 A.L.R. 3d 230 (1979).

[124] See United States v. Kampiles, 609 F.2d 1233, 1244–1245 (7th Cir. 1979),

Pretrial Agreements

In a few reported cases prosecutors have gone beyond stipulating to the admissibility of test results and have agreed to dismiss the charges if the defendant passes a polygraph examination.[125] In some cases the defendant had no obligations under such an agreement other than to cooperate in the examination.[126] In other cases the defendant either agreed to admit the test results[127] or to enter a plea to a reduced charge[128] in the event he failed the examination.

A determinative factor in the reported cases has been the existence of a statute requiring court approval for dismissals. When a trial court approved the dismissal or was aware of the agreement, appellate courts have held the prosecutor bound by the agreement on public policy grounds.[129] According to these courts, the agreement represents a "pledge of public faith—a promise made by state officials—and one that should not be lightly disregarded."[130] On the other hand, when court approval was required but not obtained, prosecution has been permitted even though a defendant successfully passed the examination.[131]

Notwithstanding the lack of court approval, enforcement of such an agreement may be required on constitutional grounds. In agreeing to take a polygraph examination, the defendant waives his Fifth Amendment privilege against self-incrimination. It seems questionable that the state could induce such a waiver by promising to dismiss the charges in the event the defendant passes the examination and then renege on that promise after the defendant has waived his constitutional rights.[132] The Illinois Supreme Court cited the defendant's waiver of the privilege in ruling that the state must abide by its agreement to dismiss if the defendant passes a polygraph test.[133] Similarly, a Pennsylvania appellate court enforced an agreement between a police officer and the defendant, which required the dismissal of charges if the defendant passed a polygraph test.[134] The court rejected the argument that the officer

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cert. denied, 446 U.S. 954 (1980); Annotation, "Admissibility of Polygraph Evidence at Trial on Issue of Voluntariness of Confession Made by Accused," 92 A.L.R. 3d 1317 (1979).

[125] See generally Annotation, "Enforceability of Agreement by State Officials to Drop Prosecution if Accused Successfully Passes Polygraph Test," 36 A.L.R. 3d 1280 (1971).

[126] See People v. Reagan, 395 Mich. 306, 309, 235 N.W.2d 581, 583 (1975); State v. Sanchell, 191 Neb. 505, 509–510, 216 N.W.2d 504, 507–508 (1974) (agreement not binding without court approval), *cert. denied*, 420 U.S. 909 (1975).

[127] See Butler v. State, 228 So. 2d 421, 424–425 (Fla. Dist. Ct. App. 1969).

[128] See State v. Davis, 188 So. 2d 24, 27 (Fla. Dist. Ct. App. 1966).

[129] Butler v. State, 228 So. 2d 421, 424 (Fla. Dist. Ct. App. 1969); State v. Davis, 188 So. 2d 24, 28 (Fla. Dist. Ct. App. 1966); People v. Reagan, 395 Mich. 306, 318, 235 N.W.2d 581, 587 (1975).

[130] State v. Davis, 188 So. 2d 24, 27 (Fla. Dist. Ct. App. 1966).

[131] State v. Sanchell, 191 Neb. 505, 510, 216 N.W.2d 504, 508 (1974), *cert. denied*, 420 U.S. 909 (1975). See also Snead v. State, 415 So. 2d 887, 889 (Fla. Dist. Ct. App. 1982) (oral agreement with sheriff who lacked authority to enter into such an agreement is not enforceable).

[132] Cf. Santobello v. New York, 404 U.S. 257 (1971) (enforceability of plea bargain).

[133] People v. Stark, 106 Ill.2d 441, 452, 478 N.E.2d 350, 355–356 (1985).

[134] Commonwealth v. Scuilli, 621 A.2d 620 (Pa. Super. 1993).

did not have the authority to make such an agreement. "Fundamental fairness"[135] required the Commonwealth to abide by its commitments.

Conclusion

This two-part article on polygraph evidence began with a discussion of two 1989 polygraph cases: *United States v. Piccinonna*[136] and *Commonwealth v. Mendes*.[137] In *Piccinonna* the Eleventh Circuit ruled polygraph evidence admissible based in part on "new empirical evidence and scholarly opinion which have undercut many of the traditional arguments against admission of polygraph evidence."[138] In *Mendes*, the Supreme Judicial Court of Massachusetts abruptly rejected its earlier landmark decision admitting polygraph evidence. According to the court, exclusion was compelled owing to "the failure of the basic theory of polygraphy to have gained general acceptance among physiological and psychological authorities."[139] These courts reached diametrically opposed views on the reliability of polygraph evidence, both basing their respective opinions on "recent scientific research." In fact, neither court cited the most recent and comprehensive research on the subject.

These cases illustrate two distinct problems. First, notwithstanding the polygraph's long history, the best research has only recently been reported. One researcher noted in 1988 that "[o]nly now are superior paradigms being developed which combine the ground truth of the laboratory with the realism of field applications."[140]

Second, courts encounter substantial problems when dealing with scientific evidence. The U.S. Supreme Court's recent rejection of the *Frye* test in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[141] will not make things any easier. Indeed, *Daubert* places even greater responsibility on the judiciary.

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[135] *Id.* at 625 (citing the doctrine of equitable immunity).

[136] 885 F.2d 1529 (11th Cir. 1989).

[137] 406 Mass. 201, 547 N.E.2d 35 (1989).

[138] 885 F.2d at 1533.

[139] 406 Mass. at 201, 547 N.E.2d at 35–36.

[140] Barland, "The Polygraph Test in the USA and Elsewhere," in *The Polygraph Test: Lies, Truth and Science* 76 (A. Gale ed. 1988). See also Department of Defense, "The Accuracy and Utility of Polygraph Testing," reprinted in 13 Polygraph 1, 58 (1984) (there "has been more scientific research conducted on lie detection in the last six years than in the previous 60 years").

[141] 113 S. Ct. 2786 (1993).