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# The Courtroom Status of the Polygraph

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# THE COURTROOM STATUS OF THE POLYGRAPH

Man is a Tool-using Animal . . . without Tools
he is nothing, with Tools he is all.

Thomas Carlyle
*Sartor Resartus*

## INTRODUCTION

THE ABOVE QUOTATION is especially true when applied to the criminal attorney. Among the tools available to him is the polygraph, commonly called a "lie detector." But like most tools, the polygraph's usefulness is limited unless operated by a craftsman who knows when to use it. This comment will inform the reader of the status and various uses of the polygraph available to the criminal attorney, with an emphasis on Ohio law.

## I. THE UNDERLYING SCIENTIFIC THEORY

A polygraph is a machine which, according to its proponents, allows a trained operator to detect lies in the statements of a person attached to the machine. The polygraph machine used by the Akron Police Department, for example, consists of a blood pressure cuff similar to that used by a doctor, two pneumograph tubes (one fastened around the subject's abdomen to measure stomach breathing and the other attached to his chest to measure chest breathing) and a galvanic skin reflex unit which electronically measures sweat gland activities when attached to a person's fingers. Although there are various types of machines,[1] the theory behind them is the same:

> that there is a definite relationship between willful lying and an elevation of blood pressure, fluctuations and the depth of respiration and variations in the resistance to electric current; that such relationship could be ascertained by means of a polygraph which simultaneously records these reactions on paper.[2]

This theory is supported by a concensus of opinion in the medical profession.[3] Thus, by interpreting changes which occur in these four measurements as the subject is questioned, the polygraph operator is able to determine the truthfulness of the subject's answers.

Although lying is a voluntary action, a person's physiological reaction to his lies is not. Whenever someone encounters an emergency situation,

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[1] Some authorities claim that at least two of the mentioned measurements must be taken for an accurate test. A. MOENSSENS, R. MOSES & F. INBAU, SCIENTIFIC EVIDENCE IN CRIMINAL CASES 541 (1973). Others insist on three measurements. R. ARTHER, THE SCIENTIFIC INVESTIGATOR 31 (1965).

[2] Testimony of Dr. LeMoyne Snyder paraphrased in People v. Darrs, 343 Mich. 348, 369, 72 N.W.2d 269, 280-81 (1955).

[3] *Id.*

the sympathetic autonomic nervous system becomes activated to help meet the emergency. This reaction is most noticeable in fear situations. For example, if a person were to step into the street in front of a truck, he would receive a rush of energy which would allow him to react quickly. Safe on the curb, his heart would be pounding ferociously. It was the autonomic nervous system which increased his heart beat in order to speed fuel and oxygen throughout his body, thus increasing his speed and strength. Other organs in the body react in a similar manner.

Being questioned concerning the commission of a crime creates a fear situation, the fear of being sanctioned. As in the earlier example, the autonomic nervous system is triggered. Respiration, pulse and sweat gland activity are all affected. But instead of aiding one's escape, these reactions, when recorded by a polygraph, may cause these fears to be realized.[4]

Unfortunately, professional acceptance of the theory behind the polygraph is not universal. According to Professor Jerome Skolnick:

> [T]he scientific basis for lie detection is questionable. There seems to be little evidence that upholds the claim to a regular relationship between lying and emotion; there is even less to support the conclusion that precise inferences can be drawn from the relationship between emotional change and physiological response.[5]

Moreover, "the autonomic response to the critical question will always be influenced by individual difference variables which are not a function of the subject's guilt or innocence."[6] For example, being accused of a crime and taking a polygraph test, whether guilty or not, will in itself create a fear situation. This would activate one's autonomic nervous system, and register a response during testing. The extent of the response would vary with the individual.[7] On the other hand, a guilty person with no fear of criminal sanctions may register no response at all. An illustration of this occurs where a subject is given a placebo and told it will immunize him from detection; if he believes it, he would 'beat' the test.[8]

The theory of the polygraph can be impaired by other characteristics of a test subject. Test results can be detrimentally affected if the subject

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[4] Testimony of Dr. William Yankee in the case of United States v. Ridling, 350 F. Supp. 90 (E.D. Mich. 1972) quoted in R. FERGUSON & A. MILLER, POLYGRAPH FOR THE DEFENSE, (1974).

[5] Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie-Detection*, 70 YALE L.J. 694, 727 (1961).

[6] Lykken, *Psychology and the Lie Detection Industry*, 29 AM. PSYCHOLOGIST 725, 730 (1974).

[7] *Id.* at 730, 731. *See also* F. INBAU, LIE DETECTION AND CRIMINAL INTERROGATION (2d ed. 1948) cited in State v. Hill, 40 Ohio App. 2d 16, 21-22, 317 N.E.2d 233, 237 (1963). *But see* J. REID & F. INBAU, TRUTH AND DECEPTION—THE POLYGRAPH ("LIE DETECTOR") TECHNIQUE 216-17 (2d ed. 1977).

[8] REID & INBAU, *supra* note 7, at 213.

suffers from a heart condition,[9] excessively high or low blood pressure, hiccups, allergies,[10] asthma, hay fever, or coughs.[11] The feebleminded and mentally retarded,[12] morons, psychotics[13] sociopaths,[14] psychoneurotics and psychopaths[15] can all cause test interpretation problems. The potential for error is increased in tests involving young children,[16] regular drug users who are presently 'straight,'[17] and persons under the influence of drugs[18] or alcohol.[19] Other factors include overanxiety, anger,[20] concern over a neglected duty (*e.g.*, a night watchman who was asleep at the time of a burglary may react to a question because of guilt feelings for letting the theft happen), involvement in similar acts or offenses,[21] extensive or suggestive prior interrogation,[22] prior testing,[23] physical discomfort,[24] adrenal exhaustion from being tested too soon after an emergency,[25] psychological evasion,[26] rationalization and self-deceit.[27] It has been suggested that the polygraph can even brainwash or subconsciously persuade a subject of his guilt through physiological feedback.[28]

Proponents of the polygraph contend that most of these problems can be minimized by a properly trained examiner.[29] However, many of those proponents concede that there are "relatively few persons holding themselves out as polygraph examiners who have the required qualifications."[30] Current state regulation provides little help. More than half of the states, including Ohio, do not have a licensing statute for examiners. Those states that do issue a license have statutes which are weak, in-

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[9] *Id.* at 234.
[10] Highleyman, *The Deceptive Certainty of the "Lie Detector"*, 10 HASTINGS L.J. 47, 60 (1958).
[11] REID & INBAU, *supra* note 7, at 235.
[12] *Id.* at 247.
[13] *Id.* at 248.
[14] S. ABRAMS, A POLYGRAPH HANDBOOK FOR ATTORNEYS 179 (1977).
[15] REID & INBAU, *supra* note 7, at 250.
[16] *Id.* at 251.
[17] *Id.* at 236.
[18] *Id.* at 20, 236.
[19] Highleyman, *supra* note 10, at 60.
[20] REID & INBAU, *supra* note 7, at 220.
[21] *Id.* at 224.
[22] *Id.* at 226-28.
[23] *Id.* at 226.
[24] *Id.* at 224.
[25] *Id.* at 226-27.
[26] *Id.* at 210.
[27] *Id.* at 227.
[28] Axelrod, *The Use of Lie Detectors by Criminal Defense Attorneys*, 3 NAT'L J. CRIM. DEF. 107, 127-28, (1977).
[29] *See* REID & INBAU, *supra* note 7.
[30] MOENSSENS, MOSES & INBAU, *supra* note 1, at 543.

effective and "generally inadequate in setting standards which would eliminate incompetent examiners."[31]

A major problem with licensing statutes is that many of them have a 'Grandfather Clause' which allows an examiner who practiced polygraphy before a specified date to continue practicing, regardless of his competence.[32] Although compassionate towards the veteran polygraphist, the clause permits reliance on a license which has not served its screening function. Licensing statutes all have minimal training and educational requirements. The problem is that many simply require a high school diploma,[33] despite the fact that it would take a psychologist or other highly educated professional to determine if a subject is a psychopath, sociopath, or other psychologically impaired person.

The scientific basis of the polygraph is further eroded by reliance on the examiner's subjective evaluation of the test subject. In their widely read and judicially recognized polygraph handbook, *Truth and Deception —The Polygraph ("Lie-Detector") Technique,* Reid and Inbau instruct examiners to note various listed symptoms of lying and truthfulness. Their list includes delays in answering a question, attitude towards the test, body movements, etc.[34] They state that:

> No final conclusions should be drawn from the subject's answers or reactions which we have pointed out as indications of probable deception or truthfulness. Nevertheless, they are very helpful as factors to be considered in the ultimate decision to be made of truthfulness or deception. At the very least, they may place the examiner on his guard against a positive opinion based upon the test results alone whenever these various pretest answers and reactions point to an opposite indication.[35]

Thus, despite claims to the contrary,[36] it appears as if:

> the professional polygrapher almost never arrives at his final diagnosis on the basis of the polygraphic records alone. . . . [I]n the vast majority

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[31] Note, *Polygraphic Evidence: The Case for Admissibility Upon Stipulation of the Parties,* 9 TULSA L.J. 250, 265 (1973).

[32] MICH. COMP. LAWS ANN. § 338.1709(a)(i) and (ii).

[33] OKLA. STAT. ANN. tit. 59, § 1458(5) (West).

[34] REID & INBAU, *supra* note 7, at 13, 17-21, 204, 292-96.

[35] *Id.* at 23-25. In a polygraph test witnessed by this writer, the test was adjudged inconclusive. The examiner later confided that he personally thought the subject was guilty. However, he noted various readings on the chart as the basis of his conclusion. Interestingly, the subject had passed an earlier polygraph test.

[36] Horvath and Reid claim a 91.4% accuracy rate for "experienced" examiners evaluating polygraph charts alone. Horvath & Reid, *The Reliability of Polygraph Examiner Diagnosis of Truth and Deception,* 62 J. CRIM. L.C. & P.S. 276 (1971). Note, however, that one of the same authors, although careful not to make a flat assertion, implies a 99%+ accuracy rate when examiners evaluate both charts and subjects. REID & INBAU, *supra* note 7, at 304.

> of field examinations, the final diagnosis results from a subjective blending in the mind of the examiner of what he has observed in the charts, in the demeanor of the subject during the test, and in the preexamination interview, what he knows of the evidence against the suspect and what he may infer from the suspect's prior history, and even any prejudices he may hold about the subject's race, age, appearance, and the like.[37]

Obviously, a critique of the polygraph does not leave its basic theory unscathed; consider this point:

> there does not appear to be general scientific acceptance of a theory to explain all the phenomena of aspirin. But even though aspirin's theoretical underpinnings may never be elucidated to the satisfaction of the scientific community, the fact is that it works.[38]

The next inquiry will be to determine if the same statement can be made of the polygraph.

Various studies of the polygraph estimate its accuracy from a high of 100 percent to a low of 63 percent,[39] with any errors which occur favoring the innocent.[40] In addition to the doubt generated merely by the large range of accuracy estimates, there are other reasons for withholding credence in these studies. Laboratory studies are unreliable because they can not adequately evoke the fear factor on which a diagnosis is made.[41] Actual case studies can not be properly verified because confessions are rare and not necessarily reliable.[42] Reference to the findings of the jury does not help gauge the accuracy of the polygraph. The unreliability of jury findings is highlighted by the perceived need for some sort of mechanical 'lie detector.' Thus, all that can safely be said about the accuracy of the polygraph is that: 1) valid diagnoses of truthfulness are often made; and, 2) errors can occur.

Even with its shortcomings, the polygraph is a valuable tool for the criminal attorney in Ohio. Its functions are investigatory, exculpatory and accusatory. These uses are regulated by the court. The remainder of this comment will study this regulation.

## II. THE GENERAL RULE OF INADMISSIBILITY

The judicial regulation of the polygraph began in 1923, when the

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[37] Lykken, *supra* note 6, at 730.

[38] Tarlow, *Admissibility of Polygraph Evidence in* 1975: *An Aid in Determining Credibility In a Perjury-Plagued System*, 26 HASTINGS L.J. 917, 922 (1975).

[39] ABRAMS, *supra* note 14, at 105 and accompanying materials.

[40] MOENSSENS, MOSES & INBAU, *supra* note 1, at 552.

[41] Lykken, *supra* note 6, at 734.

[42] Axelrod, *supra* note 28, at 132.

Circuit Court for the District of Columbia held in *Frye v. United States*[43] that polygraphic evidence is not generally admissible at trial. The defendant in *Frye* attempted to introduce the results of a polygraph test conducted solely by systolic blood pressure which vindicated him of the second degree murder charges. The appellate court held that, to be admitted, the polygraph "must be sufficiently established to have gained general acceptance in the particular field in which it belongs."[44] Placing it in the fields of physiology and psychology, the court noted the polygraph's less than general acceptance by experts in these fields. Ironically, Frye spent three years in prison before he was cleared by the confession of a third person.[45]

Criticism of *Frye* has been plentiful. McCormick feels that the general scientific standard of *Frye*:

> is a proper condition for taking judicial notice of scientific facts but not a criterion for the admissibility of scientific evidence. Any relevant conclusions which are supported by a qualified expert witness should be received unless there are other reasons for exclusion.[46]

Others contend that polygraphy is a science in itself and that the only required acceptance should be that of the polygraph community, noting that, "Not many psychologists or psychiatrists are actually in an advantageous position to evaluate the lie detector. Very few have done any applied work with it, or even experimental studies."[47] Mention is also made of the increased sophistication of both the machine and its operators since 1923.[48]

Despite these attacks on the rationale of *Frye*, the case has, with rare exceptions,[49] been followed in Ohio and throughout the nation.[50] The Ohio Supreme Court, however, has hinted that the day may eventually come when Ohio courts will admit polygraph results despite objections from op-

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[43] 293 F. 1013 (D.C. Cir. 1923).

[44] *Id.* at 1014.

[45] State v. Sims, 52 Ohio Misc. 31, 45, (C.P. Cuyahoga 1977) *citing* N.Y. JUDICIAL COUNCIL, FOURTEENTH ANNUAL REPORT 265 (1948).

[46] MCCORMICK, MCCORMICK ON EVIDENCE § 203 at 491 (2d ed. 1972).

[47] Levitt, *Scientific Evaluation of the "Lie Detector"*, 40 IOWA L. REV. 440, 457 (1955).

[48] State v. Sims, 52 Ohio Misc. at 33, 45.

[49] United States v. Zeiger, 350 F. Supp. 685 (D. D.C. 1972), *rev'd per curium*, 475 F.2d 1280 (D.C. Cir. 1972); United States v. Ridling, 350 F. Supp. 90 (E.D. Mich. 1972); Commonwealth v. A Juvenile, 365 Mass. 412, 313 N.E.2d 120 (1974); State v. Sims, 52 Ohio Misc. 31. Trial court discretion is allowed but apparently has never been exercised in the 9th Circuit. United States v. DeBethan, 470 F.2d 1367 (9th Cir. 1972), *cert. denied*, 412 U.S. 907 (1973).

[50] United States v. Canada, No. 78-5099, 78-5125 (6th Cir. Nov. 8, 1978); Baker v. State, 265 Ind. 411, 355 N.E.2d 251 (1976); State v. Levert, 58 Ohio St. 2d 213, 389 N.E.2d 848 (1979). *But see* United States v. Mayers, 512 F.2d 637, 648 (6th Cir. 1975).

posing counsel.[51] Unfortunately, the high court did not give any indication as to what type of a showing would be needed to freely admit polygraph evidence. They only stated, without explanation, that a claim that defendant was denied his constitutional right of compulsory process for attaining witnesses in his behalf is an inadequate ground for admission.[52]

Ohio courts of appeals have held that exclusion of polygraph evidence will be the rule in Ohio until its proponents can show an advancement in the reliability of the polygraph's diagnosis,[53] or until counsel can show its "scientific recognition and public acceptance."[54] Notably, the latter test did not mention whether the scientific recognition was to come from the field of polygraphy itself or from the fields of physiology and psychology as designated in *Frye*. These showings must be made on the record at the point counsel lays his foundation for the introduction of the evidence. However, the trial court may refuse to even hear the profert.[55]

## III. THE RIGHT TO TAKE OR REFUSE A POLYGRAPH TEST

*Frye* has been narrowly interpreted so that it does not preclude every courtroom use of the polygraph. Before approaching the court or the prosecutor concerning the polygraph, a wise criminal attorney will first have the test administered secretly to his client. The element of surprise is most damaging when it comes from the defendant himself. Although not conclusive, if a first test is passed it is likely that the accused will pass a second test. Most prosecutors will assume a prior test has been taken before they are contacted concerning one. Still, some will even accept the results.[56] For instance, Summit County, Ohio prosecutors are known to accept the results of a prior test subject to their approving of the test examiner.[57] This practice, however, has been questioned because of potential inaccuracies caused by a lessened fear of detection.[58]

Various criminal defendants may encounter problems in obtaining a prior test. Those defendants who are detained pending trial or who are indigent may often find it difficult to be tested in advance of any offer to the court or prosecutor to take the test. Indigents can not afford the estimated

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[51] "We are unconvinced that a departure from the safeguards enumerated in *Souel* [allowing admission upon stipulation by both counsel] is required or would be wise *at this time*." (emphasis added) State v. Levert, 58 Ohio St. 2d at 215, 389 N.E.2d at 850.

[52] *Id.*

[53] State v. Smith, 50 Ohio App. 2d 183, 198, 362 N.E.2d 1239, 1248 (1976).

[54] State v. Moore, 47 Ohio App. 2d 181, 193, 353 N.E.2d 866, 876 (1973).

[55] *Id. Accord,* United States v. Flores, 540 F.2d 432 (9th Cir. 1976).

[56] Axelrod, *supra* note 28, at 156.

[57] Interview with Angelo Fanelly, attorney, in Akron, Ohio (March 4, 1980).

[58] United States v. Wilson, 361 F. Supp. 510, 514 (D. Md. 1973); Abbell, *Polygraph Evidence: The Case Against Admissibility in Federal Criminal Trials,* 15 AM. CRIM. L. REV. 29, 41-44 (1977).

$250.00 test fee. Pre-trial detainees may be prevented access to the test by their jailors.

A solution for the pre-trial detainee is to ask the federal court to force jail authorities to allow him to be examined by a polygraph operator of his choice. When the sixth and fourteenth amendment right to the effective assistance of counsel is at stake only legitimate security interests will justify depriving an attorney of this access to his client. The arguments for ordering the desired polygraph test are even more compelling when it is pointed out that the defendant, not yet proven guilty, has been classified on the basis of his inability to meet bail and irrationally denied the same investigatory and tactical advantages as those defendants free on bail.[59]

Indigents generally do not fare as well. Although indigents represented by the county public defender's office can take advantage of the polygraph services of the state public defender, the indigent defended by appointed counsel has no such recourse. Reported Ohio cases have not yet dealt with the right of an indigent defendant to polygraphic services of his choosing,[60] but past decisions involving other expert services make it doubtful that the indigent will soon be extended this right.[61] Nevertheless, the criminal bar should relentlessly pursue the right of their indigent clients to a secret, prior polygraph test. Among the possible grounds for a constitutional claim are due process, equal protection, effective assistance of counsel, compulsory process and confrontation of witnesses.[62]

The complement to any real or theoretical right to take a polygraph is the right not to take the test. Police departments regularly suggest the polygraph to a suspect as a quick way to vindication without further involvement in the criminal process. The United States Supreme Court, in dicta, has stated that the polygraph is "essentially testimonial,"[63] making the normal fifth amendment waiver rules applicable.[64] Logically, if a defendant is in custody, he must be given his *Miranda* rights before testing

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[59] Pinson v. Williams, 410 F. Supp. 1387 (S.D. Ohio 1975).

[60] Many police departments and prosecutors will provide an indigent with a free polygraph test, generally administered by the police department. This practice, however, deprives the indigent of the benefit of a prior secret test.

[61] State v. Downs, 51 Ohio St. 2d 47, 364 N.E.2d 1140 (1977) (involving psychiatric testing); Nolan v. State, 568 S.W.2d 837 (Tenn. Crim. App. 1978) (denying polygraph testing for an indigent).

[62] Despite The Criminal Justice Act, 18 U.S.C. § 3006A (1976), which permits government paid investigatory and expert services for indigents, the federal courts have, likewise, been unreceptive to indigents' requests concerning polygraphs. Cherry v. Estelle, 424 F. Supp. 548 (N.D. Tex. 1976).

[63] Schmerber v. California, 384 U.S. 757, 764 (1965).

[64] Miranda v. Arizona, 384 U.S. 436 (1966); People v. Sims, 395 Ill. 69, 69 N.E.2d 336 (1946).

can proceed.[65] Before Ohio courts admit polygraphic evidence against a *pro se* defendant, there must be an affirmative showing on the record that the test was taken with full knowledge of his constitutional rights.[66] The better view is that prior to any testing which is later to be used in court, the judge should advise the defendant of his rights and affirmatively determine that his waiver is voluntarily, knowingly and intelligently made, regardless of any status as to counsel.[67] Surely the same guardian rationale for judicial inquiry that underlies Federal Rule of Criminal Procedure 11(C) and (D) and Ohio Rule of Criminal Procedure 11(C) and (D) in the guilty plea setting would require such inquiry prior to polygraph tests as well.

It has been suggested that the fifth amendment privilege against self-incrimination can not be waived by submitting to the polygraph. There are two rationales to this theory. The first is based on the fact that errors do occur. The suspect who is mistakenly determined to be lying could not have consented to that untruth. Since no one can determine when there is a testing error, all such waivers are void.[68] The second rationale is that a person can never know the scope of his waiver because the test reveals his unconscious mind.[69] These theories are without judicial support.

## IV. Probable Cause Hearings

The first point at which polygraphic evidence could be presented in court in a criminal proceeding is at a probable cause hearing. Ohio has no reported law on point. The limited case law at this stage of the proceedings in other jurisdictions is restricted to grand jury issues. Applying the *Frye* rationale,[70] a New York county court dismissed a criminal indictment based in part on polygraphic evidence.[71] This view finds support in the American Bar Association Standards which do not permit evidence inadmissible at trial to be submitted to the grand jury.[72]

Generally, however, courts have been reluctant to overturn convictions heard under a polygraph based indictment. Analogizing to the United

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[65] Miranda v. Arizona, 384 U.S. 436. However, there seems to be no case law directly on point.

[66] *In Re* Collins, 20 Ohio App. 2d 319, 253 N.E.2d 824 (1969).

[67] The attorney himself may have a coercive effect on a client's decision to take a polygraph. This can have an adverse effect on his rights and on the attorney-client relationship. Axelrod, *supra* note 28, at 157-60.

[68] People v. Schiers, 160 Cal. App. 2d 364, 384, 329 P.2d 1, 4 (1958) (Carter, J., dissenting).

[69] Silving, *Testing of the Unconscious in Criminal Cases*, 69 Harv. L. Rev. 683, 692 (1956).

[70] Frye v. United States, 293 F. 1013.

[71] People v. Dobler, 127 Misc. 75, 215 N.Y.S.2d 313 (1961).

[72] ABA Standards, The Prosecution Function and the Defense Function, §§ 3.5(b), 3.6(a) (1971).

States Supreme Court's acceptance of a hearsay based indictment,[73] some courts will not invalidate an indictment because of the incompetence of polygraph evidence considered by the grand jury.[74] Other courts have held that regardless of the propriety of the admission, the indictment is later cleansed by a conviction not based on the incompetent evidence.[75] Although it would be ethically preferable for the prosecutor to caution the grand jury as to any weaknesses of the polygraph, he has no duty to do so as long as he has not "affirmatively misled the grand jury into attaching inordinate weight to the polygraph examination."[76]

The issue of whether a prosecutor must submit to the grand jury the results of a polygraph test favorable to the accused, presents an interesting, but as of yet uncontested, question. Clearly, for a court to find such a duty, it must: 1) consider such evidence admissible to the grand jury;[77] 2) acknowledge an affirmative duty on the part of the prosecutor to disclose exculpatory evidence to a grand jury;[78] and, 3) hold such evidence exculpatory. Research has found no jurisdiction presently employing such a combination.

## V. BOND HEARINGS

Bond hearings are commonly overlooked as a vehicle to further a client's interests via a polygraph's results. "A defendant who has passed a polygraph test can intelligently argue to the trial court that he believes the court will reach the same not guilty result as the polygraph, and therefore he has no fear of returning to court, should be he released on bond."[79] The court should consider this evidence for several reasons. It relates to the rationale for bail (*i.e.*, to secure the appearance of the defendant at trial),[80] and the normal rules of evidence are inapplicable to bond hearings.[81] Nevertheless, "if the state objects to the introduction of the results, the court will presume that the polygraph results are favorable to the defendant and probably act accordingly."[82]

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[73] Costello v. United States, 350 U.S. 359 (1956).

[74] United States v. Narciso, 446 F. Supp. 252 (E.D. Mich. 1977).

[75] United States v. Callahan, 442 F. Supp. 1213 (D. Minn. 1978), *rev'd*, 596 F.2d 759 (8th Cir. 1979).

[76] *Id.* at 1219.

[77] United States v. Narciso, 446 F. Supp. 252. Query whether 'cleansed' evidence would suffice.

[78] N.M. STAT. ANN. § 31-6-11(B); Johnson v. Superior Court, 15 Cal. 3d 248, 539 P.2d 792, 124 Cal. Rptr. 32 (1975).

[79] Axelrod, *supra* note 28, at 156.

[80] OHIO R. CRIM. P. 46(A).

[81] OHIO R. CRIM. P. 46(I).

[82] Axelrod, *supra* note 28, at 157.

## VI. SUPPRESSION HEARINGS

Citing the general rule of inadmissibility at trial, courts have generally not been receptive to the introduction of polygraphic evidence at suppression hearings.[83] This is unfortunate. Since polygraph testing is most reliable when the examiner knows that one subject is clearly lying,[84] issues such as whether the defendant consented for a search are ideal for testing. As it stands now, it is the word of a "criminal" against the word of a policeman. The outcome is often dubious. The case of *State v. Kasold*[85] addresses the only reported exception in this area. The Arizona Supreme Court held that it is proper for polygraph test results to be considered in a hearing to suppress the fruits of a search where the probable cause for a search warrant was based in part on the test. Although not so stated by the court, the evidence was probably admitted because it went to the heart of the matter in issue (whether there was probable cause) rather than the truth of the matter asserted (the veracity of the complainant).

## VII. DISCOVERY OF POLYGRAPH EVIDENCE

"Truth is best revealed by a decent opportunity to prepare in advance of trial."[86] The rules of discovery are based on this very premise. Since discovery and the polygraph are both concerned with the truth, it is ironic that they are often incompatible in the criminal justice system.

The Ohio Rules of Criminal Procedure permit a defendant to discover "any results . . . of scientific tests . . . made in connection with the particular case."[87] Although there is no Ohio case law on point, this rather broad provision appears to make the results of a polygraph test discoverable by the defendant. However, an argument could be made that, to be considered a 'scientific test,' polygraphy must first be scientifically recognized. Depending on which field the court places polygraphy into, the results may be undiscoverable because of their lack of scientific acceptance.[88]

Even assuming that discovery is unavailable under the Ohio Rules, it may be allowed by the constitutional standards of *Brady v. Maryland*[89] and *United States v. Agurs*.[90] Under the *Brady-Agurs* rule, if information is

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[83] United States v. Sockel, 478 F.2d 1134 (8th Cir. 1973); Jordan v. State, 365 So. 2d 1198 (Miss. 1978).

[84] Horvath and Reid, *supra* note 36, at 281.

[85] 110 Ariz. 563, 521 P.2d 995 (1974).

[86] State v. Johnson, 28 N.J. 133, 136, 145 A.2d 313, 315 (1958), *cert. denied*, 368 U.S. 933 (1961).

[87] OHIO R. CRIM. P. 16(B)(1)(d).

[88] *See supra* notes 43, 44 and 47.

[89] 373 U.S. 83 (1963).

[90] 427 U.S. 97 (1976).

material to the guilt or punishment of the accused, or if it is obviously exculpatory, it must be disclosed lest a due process violation occur. While the fact that the state's key witness failed a polygraph test raises an inference of perjury and thus seems to be material and exculpatory, the fact that that information would have been inadmissible at trial allows the state to withhold it from the defendant.[91] If the defendant, however, can show that the test results would lead to additional evidence or aid in the preparation of his case, the test would then be material and the discovery would be permitted.[92] When permitted, discovery has been held to include not only the test results but also all the working materials of the examiner.[93]

Some attorneys may avoid polygraph tests because of fears of reciprocal discovery.[94] These fears are unfounded. In the first place, the rule only applies to test results "which the defendant intends to introduce in evidence at the trial, or which were prepared by a witness whom the defendant intends to call at the trial, when such results or reports relate to his testimony."[95] Thus, the defense attorney can keep the results of a bad polygraph test secret by simply not introducing them at trial. This is no infringement on the rights of the accused because there would be no reason to introduce bad results into evidence. Also, since the test is "essentially testimonial,"[96] the results could not be elicited in violation of the defendant's fifth amendment right against self-incrimination.

## VIII. Admission Through Stipulation

As discussed, the results of a polygraph examination are generally not admitted at trial. The major exception to this rule is when both parties stipulate to its admission. Although many courts note the polygraph's unreliability and state that the rule against admissibility can not be circumvented by agreement,[97] the trend is to accept the stipulated evidence at trial. Ohio, in *State v. Souel*,[98] became one of at least twenty states accepting stipulations. Souel, accused of a robbery-murder, entered into a written stipulation with the prosecutor which on its face permitted the re-

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[91] Imbler v. Patchman, 424 U.S. 409, 445 (1976) (White, J., concurring); Ballard v. Superior Court, 64 Cal. 2d 159, 410 P.2d 838, 49 Cal. Rptr. 302 (1966); Zupp v. State, 258 Ind. 625, 283 N.E.2d 540 (1972).

[92] Ballard v. Superior Court, 64 Cal. 2d 159, 410 P.2d 838, 49 Cal. Rptr. 302; Zupp v. State, 258 Ind. 625, 283 N.E.2d 540.

[93] Galloway v. Brewer, 525 F.2d 369 (8th Cir. 1975).

[94] Ohio R. Crim. P. 16(C)(1)(b).

[95] *Id.*

[96] Schmerber v. California, 384 U.S. 757.

[97] Pulakis v. State, 476 P.2d 474 (Alas. 1970).

[98] 53 Ohio St. 2d 123, 372 N.E.2d 1318 (1978).

sults of a polygraph test to be introduced as evidence at the trial.[99] Souel was implicated in the crime by the test results and objected to their introduction. The objection overruled, the prosecutor then called the polygraph examiner to the stand who, before disclosing the test results, testified as to his polygraph training and experience and also as to how the test was administered to the defendant.[100] On cross-examination, defense counsel reviewed that testimony and further questioned the examiner as to the conditions under which the test had been administered and the various possibilities for error.[101] The court's jury instruction emphasized the point that the polygraph results should be weighed with all the other evidence and that it can not in and of itself be deemed conclusive on any point.[102] Souel was thereafter convicted.

Relying heavily on the Arizona case of *State v. Valdez*,[103] the Ohio Supreme Court affirmed the conviction. The court, in its syllabus, held that:

> The results of a polygraphic examination are admissible in evidence in a criminal trial for purposes of corroboration or impeachment, provided that the following conditions are observed:
>
> (1) The prosecuting attorney, defendant and his counsel must 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) Notwithstanding the stipulation, the admissibility of the test results is subject to the discretion of the trial judge, and 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) If the graphs and examiner's opinion are offered in evidence the opposing party shall have the right to cross-examine the examiner respecting:

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[99] For examples of stipulations, see State v. Souel, 53 Ohio St. 2d at 124, 372 N.E.2d at 1319; State v. Towns, 35 Ohio App. 2d 237, 243-44, 301 N.E.2d 700, 705-06 (1973); Note, *Admissibility of Polygraph ("Lie-Detector") Evidence Pursuant to Stipulation in Criminal Proceedings*, 5 AKRON L. REV. 235, 249-50 (1972); REID & INBAU, *supra* note 7, at 334-35.

[100] This testimony should also include an explanation of the theory behind the polygraph. For an example of a preferred direct examination, *see* FERGUSON & MILLER, *supra* note 3, at 157-96.

[101] For an example of a proper cross-examination, *see Id.* at 198-225.

[102] Jury misuse of polygraphic evidence can also be prevented by the proper use of voir dire. For an example of a recommended jury instruction, *see* Note, *Insurmountable Barriers for the Polygraph*, 12 TULSA L.J. 682, 696 (1977). Note that passing a polygraph examination does not in itself create a reasonable doubt of guilt. State v. Jenkins, 525 P.2d 1232 (Utah 1974).

[103] 91 Ariz. 274, 371 P.2d 894 (1962).

(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) If such evidence is admitted the trial judge should instruct the jury to the effect that the examiner's testimony does not tend to prove or disprove any element of the crime with which a defendant is charged, and that it is for the jurors to determine what weight and effect such testimony should be given.[104]

These criteria are designed to "respond to the major objections to the admission of polygraph evidence."[105] First, the reliability of a polygraph test is more dependent on the examiner himself than on any other variable. By stipulating to an examiner of their choice, the parties can arguably screen out incompetent operators. Protection from inaccurate results is further afforded by the court's additional screening power and by cross-examination.[106] "The device of cross-examination soon smokes out the inept, the unlearned, the inadequate self-styled expert."[107] Second, the stipulation quashes judicial debate over the accuracy of the polygraph and lays the foundation for its probative value.[108] Theoretically, the stipulation is in the nature of a plea bargain. It is an agreement not to object to the introduction of the evidence enforceable by a contract analogy or by public faith and policy.[109] Thus, without a proper objection, the evidence is admitted. Finally, proper jury instructions will reduce the chances of the jury placing undue reliance on the test results.[110]

The *Souel* qualifications must be rigidly interpreted by Ohio courts. Failure to do so will result in unfairness and disregard of *Frye*[111] and *Levert*.[112] The fear of 'trial by polygraph' should cause courts to guard against uncorroborated polygraphic evidence. If the stipulation is not in writing, it must be rejected. "[M]ore formality should be required to give effect to

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[104] State v. Souel, 53 Ohio St. 2d at 123, 372 N.E.2d at 1318-19.
[105] *Id.* at 133, 372 N.E.2d at 1323.
[106] *Id.*
[107] *Id.* at 134, 372 N.E.2d at 1324, *quoting* Gullin v. State, 565 P.2d 445, 458, (Wyo. 1977).
[108] *Id.* at 133, 372 N.E.2d at 1323.
[109] People v. Reagan, 395 Mich. 306, 235 N.W.2d 581 (1975). *Cf.* Santobello v. New York, 404 U.S. 257 (1971).
[110] State v. Souel, 53 Ohio St. 2d at 133, 372 N.E.2d at 1323.
[111] Frye v. United States, 293 F. 1013.
[112] State v. Levert, 58 Ohio St. 2d 213, 389 N.E.2d 848.

an agreement of such importance."[113] A writing further clarifies each party's expectations. The stipulation must always be signed by the defendant, his attorney and the prosecuting attorney. The defense attorney is necessary for the protection of the defendant. Without advice from his counsel as to the machine's reliability, his right not to take the test, etc., the defendant's waiver could hardly be considered knowing, voluntary and intelligent. Further, counsel can bargain for the defendant to gain favorable or at least fair terms in the stipulation (*e.g.*, submission to the test but not to a post-test interrogation). The decision by the prosecutor not to stipulate in any given case is his decision alone and should not be circumvented by the court.[114] Since a report can not be cross-examined, it is essential that the person who administered and interpreted the test be present at trial.

There are two areas where courts have permitted variations in the criteria for an admissible stipulation. Echoing the rationale for allowing an agreement to introduce the results at trial, courts have upheld agreements by the prosecutor to dismiss the charges if the defendant passes the test. In *People v. Reagan*[115] the prosecutor later found that the test results were unreliable because of the defendant's schizophrenia. The Michigan high court compelled the dismissal of the defendant's charges stating, "[I]t would have been advisable, at the very least, that the prosecution acquaint itself with the limitations of the polygraph before entering into an agreement to dismiss the case on the basis of polygraph results."[116]

The prosecutor could best protect the interests of the community by employing the "introduce at trial" stipulation. While most defendants who pass the test will be summarily dismissed, that stipulation, unlike the "dismiss the charges" stipulation, allows the prosecutor flexibility when newly discovered circumstances call for continuing the litigation.

Finding no reason to treat a defendant and a witness differently, courts have condoned stipulations when the person tested was merely a witness.[117] An occasional court has gone one step further, implying a stipulation when the prosecution has a witness polygraphically tested, reasoning that the prosecutor would not have had the witness take the test if he were not satisfied with its results.[118]

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[113] Colbert v. Commonwealth, 306 S.W.2d 825, 827 (Ky. App. 1957).
[114] State v. Forgan, 104 Ariz. 497, 455 P.2d 975 (1969).
[115] 395 Mich. 306, 235 N.W.2d 581.
[116] *Id.* at 318, 235 N.W.2d at 587.
[117] State v. Stanislawski, 62 Wis. 730, 216 N.W.2d 8 (1974).
[118] United States v. Hart, 344 F. Supp. 522 (E.D. N.Y. 1971); State v. Christopher, 134 N.J. Super. 263, 339 A.2d 239 (1975), *rev'd*, 149 N.J. Super. 269, 373 A.2d 705 (1977).

 

## IX. EVIDENCE OF DEFENDANT'S WILLINGNESS OR REFUSAL TO BE TESTED

Since without a proper stipulation "evidence of the result of a lie detector test is inadmissible in a criminal case, evidence of suspect's [*sic*] willingness or unwillingness to take such a test is also inadmissible."[119] Mention at trial by the defendant of an offer to submit to a polygraph test is self-serving, since unfavorable results could not have been used against him.[120] Comment upon defendant's failure to take a polygraph test is an improper comment on the exercise of a right.[121] Also, the bare refusal may be more prejudicial than admitting test results along with evidence as to the test's limitations.[122] Comment before the jury as to whether a test was actually taken is likewise frowned upon.[123]

However, the Ohio Supreme Court feels that an instruction to disregard these remarks erases the tainted disclosure from the jury's collective mind. Thus there is no prejudice.[124] The court, strangely, refutes its own reasoning when it states, "such testimony was . . . no doubt damaging to the defendant."[125] Applying the cleansing instruction rationale, an Ohio court of appeals held that despite the fact that a prosecutor told a detective that his testimony could include the fact that a polygraph test was taken, the officer had not been improperly coached. More disturbing, the court continued its cleansing rationale, writing that, even had the prosecutor and witness acted in bad faith, the result would have been the same since "we are not concerned with something which happened of which the jury had no knowledge."[126]

A Michigan case, *People v. Johnson*,[127] contains an interesting application of the cleansing instruction rule. There the prosecutor objected when the defense attorney questioned a police officer as to the defendant's willingness to submit to a polygraph examination. The trial judge, without the defendant's consent, ordered a mistrial. The Michigan Supreme Court held that reprosecution was barred by Double Jeopardy. Since mentioning the polygraph was a mere irregularity which could have been cured by an instruction, there should have been no mistrial. Once jeopardy attaches,

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[119] State v. Smith, 113 Ohio App. 461, 464, 178 N.E.2d 605, 608 (1960).
[120] State v. Rowe, 77 Wash. 2d 955, 958-59, 468 P.2d 1000, 1003 (1970).
[121] *Cf.* United States v. Hale, 422 U.S. 171 (1975).
[122] State v. Hegal, 9 Ohio App. 2d 12, 222 N.E.2d 666 (1964).
[123] State v. Holt, 17 Ohio St. 2d 81, 246 N.E.2d 365 (1969).
[124] *Id.*
[125] *Id.* at 84, 246 N.E.2d at 367.
[126] State v. Collins, 60 Ohio App. 2d 116, 123, 396 N.E.2d 221, 226 (1977).
[127] 396 Mich. 424, 240 N.W.2d 729 (1976).

only with the defendant's consent can a second prosecution be instituted after an unnecessary mistrial, regardless of the trial judge's motivation.

Testimony concerning a witness' refusal to submit to a polygraph may theoretically be sustained. If a showing can be made that the witness believed the test to be dependable but refused to be tested, his refusal is relevant in that it bears on his credibility.[128]

## X. POLYGRAPH INDUCED CONFESSIONS

According to many polygraph operators, an examination is incomplete without a post-test interview.[129] Here, the operator, often a former or present law officer, attempts to elicit a confession from the subject. A confession thereby eliminates concern over admission of the results. The examiner plays on the fact that "[t]he entire testing procedure has a decided psychological effect in convincing criminals to confess to the specific crime under investigation."[130] A popular technique is to tell the subject, regardless of the test results, that the examination indicates deception. The operator rationalizes as follows:

> Some may question the ethics of such a procedure, but in the types of crime in which the test is usually applied, it would seem that the interests of justice outweigh the consideration of ethics, especially in this country, where the defendant's legal rights are so thoroughly protected.[131]

This and other tactics, although not as brutal as the old method of beating out confessions which the polygraph was intended to replace,[132] can be equally unreliable.[133] Illustrative is an incident concerning a young bank officer who failed a polygraph test. "Believing that the polygraph could not be wrong, he confessed to thefts that subsequent audits revealed had not taken place."[134]

A criminal suspect has a fifth amendment right to remain silent. While there may be times when a confession is in his best interests, during a polygraph test is not one. It is the job of an attorney to protect his client's rights and interests from overzealous and unethical polygraphists who feel

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[128] State v. Mottram, 158 Me. 325, 184 A.2d 225 (1962).

[129] ABRAMS, *supra* note 14, at 69.

[130] ARTHER, *supra* note 1, at 27.

[131] Axelrod, *supra* note 28, at 134, *quoting* C. LEE, THE INSTRUMENTAL DETECTION OF DECEPTION 187 (1953).

[132] Axelrod, *supra* note 28, at 110-11 and cited materials.

[133] *See supra* notes 23 and 42.

[134] Burley, *The Case Against the Polygraph*, 51 A.B.A.J. 855, 856 (1965), *citing* Dearman & Smith, *Unconscious Motivation and the Polygraph Test*, AM. J. PSYCHIATRY 1017 (May, 1963).

that the United States Constitution is a roadblock to justice. An attorney can perform this task by following a few simple steps:

1) Know your operator. Reputations as to whether a given operator attempts to elicit a confession or not are quickly earned and should not go unheeded.

2) Enter into an agreement with the operator prohibiting interrogations. Those examiners who will not cooperate can be quickly forced into such an agreement by market conditions such as a boycott of their business by attorneys.

3) Instruct your client not to confess and, further, not to say anything once the actual machine testing is completed.

4) Always remain in an adjoining room with a one-way mirror and a sound receiver when your client is with a polygraphist. An attempt to elicit a confession can be quickly concluded by a strong kick on the wall followed by the attorney's appearance in the test room.

Unfortunately, not all defendants are fortunate enough to be represented by counsel at the time of a polygraph test. The police often suggest the polygraph as a quick and simple way 'to clear up this mess,' before an attorney can be secured.

The courts must provide these people with protection. Clearly, a polygraph-induced confession is admissible in Ohio.[135] But that confession must be voluntarily, knowingly and intelligently made. In addition, while the confessor is in custody, any interrogation must be prefaced by a recital of his *Miranda* rights.[136] Conversely, if a suspect is not in custody, he need not be given the *Miranda* warning even though the police may have been involved with the testing.[137] If a defendant is illegally in custody, the *Miranda* warning does not legitimize a polygraph-induced confession. His confession is excluded as a fruit of the illegal arrest.[138]

The first recorded case allowing a polygraph-induced confession to be admitted at trial did so with the condition that the confession was not procured by tricks likely to cause an untruth.[139] By applying similar lan-

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[136] State v. Chase, 55 Ohio St. 2d 237, 378 N.E.2d 1064 (1978). *But see* State v. Schliss, 86 Wis. 2d 26, 271 N.W.2d 619 (1979), where the court held that since the post-test interview is just another phase of the test, a polygraph induced confession is inadmissible unless there is a stipulation.

[136] State v. Chase, 55 Ohio St. 2d 237, 378 N.E.2d 1064.

[137] United States v. Montanye, 500 F.2d 411 (2nd Cir. 1974), *cert. denied*, 419 U.S. 1027 (1974).

[138] Commonwealth v. Brooks, 468 Pa. 547, 364 A.2d 652 (1976).

[139] Commonwealth v. Hipple, 333 Pa. 33, 3 A.2d 353 (1939).

guage to nonpolygraph confessions,[140] Ohio seemed to accept that view. Later cases from foreign jurisdictions refined the rule, holding that trickery alone does not void polygraph-impelled confessions unless accompanied by a threat or promise.[141] An example of a threat can be found in *Commonwealth v. Starr*,[142] where the operator promised to show the test results to the judge who would know that they were reliable. An examiner's post-test statement that if the defendant confessed he "would probably more than likely receive probation" has been held to have been a promise which so overdrew his free will that the confession must be excluded as not freely and voluntarily made.[143]

A more logical view is that police trickery or deception makes a confession void because it is not voluntarily, knowingly, and intelligently made. At the very least the deception should be a factor bearing on voluntariness.[144] *Miranda* teaches us that "any evidence that the accused was threatened, tricked or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege."[145] The Ohio Supreme Court, interpreting this statement in dicta has stated that:

> "Cajolery," in this context, may be defined as the act of persuading or deceiving the accused, with false promises or information, into relinquishing his rights and responding to questions posed by law enforcement officers.[146]

Surely, a false statement to a subject that the polygraph detected a lie is cajolery by the examiner and should be excluded.

Attempts have been made to show that a confession was voluntary by introducing evidence that the defendant confessed upon being confronted by his deceptive polygraph results. The evidence was admitted in *Tyler v. United States*[147] as relevant to the circumstances leading to the confession but not to the correctness of the test or the statement. A limiting instruction, of course, was given to the jury. *State v. Green*,[148] on the other hand, stands for the proposition that this relevance is outweighed by the danger of prejudice to the defendant by the jury knowing or inferring that the defendant failed a polygraph test.

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[140] Burchett v. State, 35 Ohio App. 463, 172 N.E.2d 555 (1930).
[141] People v. McGuffiin, 55 A.D.2d 772, 389 N.Y.S.2d 478 (1976).
[142] 406 A.2d 1017 (Pa. 1979).
[143] State v. Franks, 239 N.W.2d 588 (Iowa 1976).
[144] Schmidt v. Hewitt, 573 F.2d 794 (3rd Cir. 1978).
[145] Miranda v. Arizona, 384 U.S. at 476.
[146] State v. Edwards, 49 Ohio St. 2d 31, 39, 358 N.E.2d 1051, 1058 (1976).
[147] 193 F.2d 24 (D.C. Cir. 1951), *cert. denied*, 343 U.S. 908 (1952).
[148] 271 Or. 153, 531 P.2d 245 (1974).

## XI. POST-TRIAL USE OF POLYGRAPH EVIDENCE

Even after the trial has ended, there are still times when the polygraph may become an issue. Some judges will, prior to sentencing, extend an opportunity to the defendant to take a polygraph test on the:

> rare occasions where there has been a violent reaction and a strong protest against a finding of guilt and it was a matter of veracity between the parties, particularly in some sex cases where there was the word of one against the other.[149]

At least one state bans this practice by statute.[150] Other states, through their appeals courts, will order a new trial in this situation. By making this offer, the trial court raises an inference that guilt had not been established beyond a reasonable doubt.[151]

Polygraph evidence pertaining to issues not in issue at trial have been admitted during sentencing hearings. In *State v. Jones*[152] the Arizona high court encouraged the trial court's utilization of the polygraph concerning an unrelated rape in an attempt to individualize the sentence. In considering whether to revoke a pre-sentence release, a New Jersey court likewise admitted test results:

> to show facts not decided by the trial jury or material to their deliberations—for example, to show his attitude, obedience to instructions of the court, and disprove accusations he has not been tried for.[153]

The court felt that this was no longer an adversarial stage and that it was its duty to have the best available information concerning every aspect of the defendant's life before it.[154]

The final area where a defendant may wish to utilize polygraphic evidence is when he is petitioning the court for a new trial.[155] In the only recently reported Ohio case on point, the Court of Appeals for Carroll County concluded that a post-conviction polygraph test taken by the defendant which exonerated him was not newly discovered evidence.[156] Had the defendant wanted the test results to be considered he:

> could have easily offered this type of evidence at the time of his trial, and if the admission of such had been prohibited by the trial court,

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149 Brown v. State, 28 Wis. 2d 383, 390, 137 N.W.2d 53, 56-57 (1965).
150 ILL. ANN. STAT. ch. 38, § 155-11 (Smith-Hurd).
151 Meyer v. State, 25 Wis. 2d 418, 130 N.W.2d 848 (1964).
152 110 Ariz. 546, 521 P.2d 978 (1974).
153 State v. Watson, 115 N.J. Super. 213, 219, 278 A.2d 543, 546 (1971).
154 *Id.*
155 OHIO REV. CODE ANN. § 2945.80 (Page 1975).
156 State v. Jaroszyk, 39 Ohio App. 2d 35, 315 N.E.2d 521 (1973).

he could have protected the record by proffering said evidence, and these matters could have then been determined by a direct appeal.[157]

Although the appellate court did not pursue the matter in detail, their decision was proper under Ohio Revised Code Annotated Section 1945.80. Under that statute, evidence sufficient to require a new trial must be: 1) material; 2) newly discovered; and, 3) could not with reasonable diligence have been earlier discovered. Inadmissible at a new trial, the evidence is immaterial because nothing new would be added to the second trial.[158] Further, evidence available to the defendant at any time upon his taking a test, can hardly be considered newly discovered evidence which could not, with reasonable diligence, have been earlier discovered.[159]

## CONCLUSION

An artisan must know his tools—their common uses, their potential and their limitations. This comment, in considering the criminal attorney as an artisan, has dissected the uses, potential and limitations of the polygraph. The polygraph has a place in the criminal justice system. That place is in aiding the court in its noble search for the truth. It is an attorney's duty to his client and to his society to present the court with this valuable tool.

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[157] *Id.* at 138, 315 N.E.2d at 523-24.

[158] State v. Scott, 210 Kan. 426, 502 P.2d 753 (1972), (accord in result only). Michigan, however, allows this evidence when it is buffered by other nonpolygraphic evidence. People v. Barbara, 400 Mich. 352, 255 N.W.2d 171 (1977).

[159] McCroskey v. United States, 339 F.2d 895 (8th Cir. 1965).