3-1973

Lie Detector Test - LMS Notes

Lewis Steel '63

question of fact - particular case

People v Keene 25 NY 2d 511 (1969)
517

look for guilty plea

307 NY S 2d 430

United States v Riddle
350 F. Supp 90 (E.D. Mich 1972)

Act does not prevent

Examiner did not claim denial of fault, which be interpreted as "deceptive" & amounted to the equivalent of an admission of guilt.

on record before us

Use of polygraph tests

F. Lee Bailey - Dr Barnett

617 - 723 - 1580

3091-3 Michael Meltzner

Columbia L. School

280 - 2640

3867

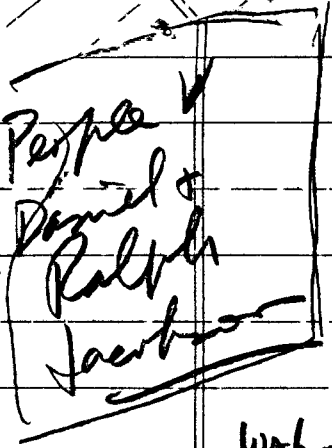
Amsterdam
F. Lee Bailey
ALR 2d Bailey
Crim L. Reporter
14c
Richardson
F. Sch
Trial tactics by Keaton

Journal of Police Science

50
Howard

Paternity petition of Daun Stenger
Family Court, Niagara County
336 NYS 2d ~~633~~ & 35
71 Misc 2d 79

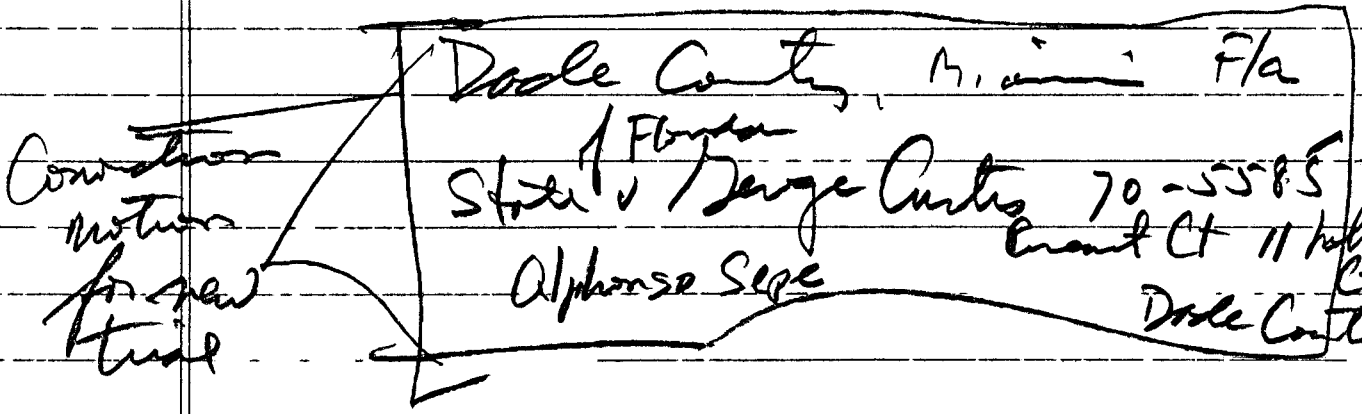
176965



Judge Peter Fornell
non objection of D.A.

Washington US v Zeiger — USDCt Judge Parker

Detroit US v Redlings — US Dt Cts Judge Jones



Long Island Case

Long Island Press
Dec 13, 1972
[illegible]
Iwen Hsiao

Allowed in

Civil Case

Judge Edwin Kassoff 252-61 [illegible] Rd, Little Neck 11362

Queens Civil Court
Little Neck

civil court - 544-9300

Walther v O'Connell

Ro allowed

U.S v Lavone Miller ED of Penn
Crim 72-621
P v Ridlins Oct 6, 1972 US [illegible]

NY City federal Ct -

Jack Weinstein E.D.
596-4718

Granted

United States v ~~Phillips~~ Dioguardia Long Island Press Dec 2, 1972
Nov 3, 1972

Barry Slotnick
Park Row
233-5390

People v Cutler allowed

Queens Case
Superior Cout # A176965

Judge Allan Miller - Torrance, Cal

trial court erred in not taking steps to purge the prejudicial effect in the eyes of the jury of the remarks of the special prosecutor. Appellant equates the situation with that in which corrective action by the trial court was required to avoid prejudicial error becuase the prosecutor applied unbecoming names to the defendant. State v. Burnett, Mo. Sup., 429 S.W. 2d 239, 245-246[9],[10,11]; State v. Stroud, 362 Mo. 124, 240 S.W. 2d 111, 113[9,10]. The situation presented by those cases is distinguishable on two grounds. First, the prosecutor applied unbecoming names to the defendant, whereas here the prosecutor was reporting to the court the names which the defendant had applied to him. Second, the trial court in those cases was requested to take remedial action and did so. Here, no remedial action was requested and the trial court did not err in failing to act of its own motion. State v. Williams, Mo. Sup., 419 S.W. 2d 49, 53[6]; State v. Bland, M. Sup., 353 S.W.2d 584, 587[7].

The denial of right to effective assistance of counsel is asserted on the basis that trial counsel * * * failed to object to testimony by the women, other than the complaining witness, of the details of the assaults by defendant upon them. * * *

Failure to object to the testimony concerning the assault by appellant upon the women other than the prosecutrix in the case on trial does not evidence inadequacy of representation amounting to deprivation of right of counsel. Part of appellant's defense was that he was incapable of committing four acts of intercourse. Trial counsel may have felt that permitting the entire occurrence to go before the jury would add credence to the defense. In any event, the testimony of the other women was so interrelated with the assault on the one that an objection would not have precluded its admission. See State v. Wilson, Mo. Sup., 320 S.W. 2d 525; State v. Swinburne, Mo. Sup., 324 S.W. 2d 746, 753[9]. *[End Text]* – Welborn, C.

(State v. Johnson; Mo SupCt, 9/11/72)

ACCUSED PERJURER ENTITLED TO OFFER POLYGRAPH EXPERTS' OPINION

Michigan Federal Court stresses progress made, adaptability of polygraph evidence to existing rules of evidence, and facts of this case.

A perjury defendant is entitled to offer opinion testimony by polygraph experts concerning the asserted truthfulness of the allegedly perjurious statements, the U.S. District Court for Michigan holds, if he is willing to submit to testing by court-appointed experts as well.

The polygraph has made great strides in recent years, and cases forbidding use of its results" are not persuasive insofar as they are predicated on the unreliability of the polygraph."

However, as a precondition to the administration of his experts' testimony, the defendant must submit to testing by one or more court-appointed expert polygraph examiners, who will determine whether the defendant can be tested. If he can, they also will testify as to their opinions of his truthfulness on the basis of the tests. (U.S. v. Ridling, 10/6/72)

Digest of Opinion: As part of his defense, this perjury defendant seeks to offer testimony of one or more polygraph experts who, he asserts, will testify that, as a result of their tests, it is their opinion that he is telling the truth when he makes the statement allegedly the basis for this indictment. Following a pretrial evidentiary hearing, this court has determined that under the circumstances indicated, and subject to the conditions stated, the evidence will be admitted at trial.

[Text] The Court has heard evidence in this case from persons who are experts in the use of polygraphs to establish the value and reliability of the results of the tests. The evidence includes the following:

1. The basic theory of the polygraph. 2. The reliance on the polygraph by government agencies. 3. The reliance on the polygraph by private industry. 4. The comparative reliability of the polygraph and other scientific evidence such as fingerprint and ballistic evidence. 5. The opinions of the experts as to whether polygraph evidence would be a valuable aid in connection with the determination of the issues such as the one facing the Court in this case and in the administration of justice.

The evidence supports the statements set out in this Memorandum. * * *

The polygraph is a scientific device that measures and records a number of involuntary body responses to stress. It measures and records blood pressure changes, pulse changes, respiration changes, as well as changes in the skin's resistance to electricity. It appears that the sophistication of these measurements is constantly improving and that it is likely devices will be developed for use in the future to measure other involuntary body responses to stress.

The polygraph is based on the principle that the autonomic nervous system will respond to stressful conditions and that sympathetic parts of that system will respond involuntarily. These parts of the system are not controllable. Their reaction is automatic. It is well established that the sympathetic part of the autonomic nervous system causes internal organs of the body, the heart, the breathing apparatus, the perspiration glands, the stomach and others to change their activity when placed under stress, as for example, when confronted by an emergency. The polygraph measures some of the results of this automatic response to stress. Current versions of the device measure changes in the activity of some of these internal organs, for example, the changes in the blood pressure, pulse, respiration, and the sweat gland activity.

A lie is an emergency to the psychological well being of a person and causes stress. Attempts to deceive cause the sympathetic branch of the autonomic nervous system to react and cause bodily changes of such a magnitude that they can be measured and interpreted.

There are three types of interpretations that can be given a well conducted examination:

1. The subject is willingly not telling the truth.
2. The subject is telling the truth as he sees it.
3. The test is inconclusive, e.g. the examiner cannot tell if the subject is or is not telling the truth.

Not more than 6% of well conducted tests result in this third conclusion, and a number of them can be tested effectively on retest.

For a test to be successful, it is important that the examination be conducted under controlled circumstances, that the subject cooperate with the expert, that appropriate scientific methods be used in connection with the questioning of the subject, that the subject understands the meaning of the questions as they are asked, that the recording device or polygraph be in good operating condition and be connected properly and that a person skilled in the interpretation of the polygraph charts make the interpretation of the test results. *[End Text]*

The group of persons considering themselves experts in the use of the polygraph have recently organized to exchange ideas and improve themselves. The scientific psychological basis for the polygraph examination is well established. Tests are already utilized by police departments, various parts of the federal Government, and some segments of private industry. Several major schools offer courses in the giving of polygraph tests and the reading of polygraph results. Opinions differ as to which of the

various techniques is best, but nothing in these differences cast doubt on the basic theory behind the polygraph. All experts agree that polygraph evidence would be valuable in helping to determine the kinds of issues involved in this case and in the process of administering justice.

Polygraph testimony in reality is opinion evidence, obtained from a necessarily carefully arranged and supervised interrogation. The results must be interpreted.

At the outset, it must be noted that this case is the best possible for testing the admissibility of polygraph testimony. Perjury is the willful knowing giving of false testimony. The polygraph examination is aimed exactly at this aspect of truth. A subject's honest mistake of fact will be recorded by a polygraph as a truthful answer.

While judicial opinions point to exclusion of polygraph results.

[*Text*] Although these opinions are entitled to great weight in considering the matter at this time, they are not persuasive insofar as they are predicated on the unreliability of the polygraph. This is a question to be determined in each case, U.S. vs. Wainwright, 413 F.2d 796 (10th Cir. 1969). Techniques improve. The evidence in this case indicates that the techniques of the examination and the machines used are constantly improving and have improved markedly in the past ten years.

The historical process of developing the admissibility of opinions interpreting scientific evidence is a simple one.

Someone has an idea and a theory, e.g. that no two fingerprints are the same and that fingerprints can be analyzed, measured and catalogued; that alcohol in blood can be used to determine intoxication; that voices can be recorded, charted and analyzed to provide a means of comparison for the purpose of identification; that the principles of radar can be used to measure speed of vehicles. This and other persons develop the idea and theory until it has some acceptance.

When opinions interpreting the results are first offered in Court, the underlying premises require a great deal of proof, as well as does the proper use of these premises, the necessary controls used in the specific cases and the appropriate qualifications of the expert. On proper proof, the evidence becomes admissible. The attention of the Courts at this point seems to be directed at the proper qualification of an expert witness, including testimony, establishing the underlying theory.

Finally, the underlying principles and premises become so well established and known that the only real issues for determination in connection with the reception of evidence is the proper use of the principles, premises and theories and the use of adequate controls in the specific case to assure good results. In other words, at this stage the Courts judicially notice the basic theories and premises. They need no longer be proved. This is true today in the area of fingerprint identifications, ballistics identifications, blood tests for intoxication, radar and many others. Even so, properly qualified experts, persons knowledgeable in the theory and practice of the special field, are needed to relate the results and data to the issue in the case. Usually this involves the expression of an opinion by the expert. * * *

The use of expert opinions interpreting the results of lie detector tests in Court is still at one of the first two stages, and judicial opinions denying admissibility give way to the developments in the science itself or in the techniques used in its application or in the interpretation of the results. The record in this case indicates that the theory of the polygraph is sound and that it is directly relevant to this case (a perjury case), and that therefore the cases denying admissibility on these grounds are not controlling. * * *

The following problems are presented:

1. Is the evidence of such a nature that the jury will attach too much weight to it? 2. What is the effect of the privilege against self incrimination? 3. Will the trial process be upset by the use of the polygraph? 4. Is there a hearsay problem? * * *

The evidence offered in this case * * * is not in any way remote to the issues to be determined. It goes to the very heart of the case. In comparable situations, the Courts do not reject evidence – radar for speeders, U.S. vs. Dreos, 156 F. Supp. 200 (D.C. Md. 1958); fingerprints, People vs. Chimowitz, 237 Mich. 247 (1927); ballistics evidence, Goodall vs. U.S., 180 F.2d 397 (C.A.D.C. 1950); blood tests, Schmerber vs. California, 384 U.S. 757 (1966), Kemp vs. Gov't of the Canal Zone, 167 F.2d 938 (C.C.A. Canal Zone 1948); voice prints, Trimble vs. Hedmans, 192 N.W. 2d 432, (1971) and U.S. vs. Raymond, 337 F. Supp. 641 (1972). The evidence is admitted for its worth, and the expert who attempts to make more from it than he should seldom survives a good cross examination. * * *

In the other areas of scientific opinion mentioned above, science has been helpful on central issues and the opinions have not been rejected. Speed testers establish the central issue in speeding cases. Breathalizers and blood tests establish the central issue in cases involving intoxication. The fact is that, just as in these other cases, the relevancy of the polygraph evidence is high and its use will likely protect both society and the defendant. * * *

It is argued that polygraph use will result in the injection of many collateral issues in the trial. This could be the case if the Court were to permit its use on all witnesses as has been urged by the defendant in this case. This Court is not willing to go so far. * * * As to the defendant, the issues are not likely to be collateral but very directly involved. At the present time, the defendant can put his character in issue to establish the likelihood he did not do the act, Proposed Rules of Evidence for U.S. District Courts, Rule 404 (a) (1). A defendant who testifies may have his character challenged, Proposed Rules of Evidence for U.S. District Courts, Rule 608 (a). These issues themselves are collateral but are well established and provided for in procedural rules as are their limitations. Fitting in the polygraph opinion will require no alteration of these rules. [*End Text*]

Although the polygraph profession is becoming standardized and professionalized, it has not yet developed adequate methods of self policing. Furthermore, controls on the admissibility of evidence are necessary.

[*Text*] The hurdle can be overcome, however, by the use of the Court's power to appoint experts, Federal Rules of Criminal Procedure, Rule 28, Proposed Rules of Evidence for U.S. District Courts, Rule 706. Because it may not be easy for the Court to determine the quality of the polygraph experts tendered by the defendant, it seems proper in such cases to cause polygraph experts of the Court's own choosing to be appointed who should be directed to test the defendant. * * *

In the event that the expert concludes positively that the subject is or is not telling the truth, the expert of the defendant and the expert of the Court may be produced and give testimony. In such a case, the Court's experts and the defendant's experts both agree that the subject is a person who can be tested appropriately and the testimony of each should be admitted, even though it might disagree on the ultimate issue. If, on the other hand, the Court's expert believes that it cannot be determined whether or not the subject is telling the truth, the opinion of both experts should be rejected. [*End Text*]

If it turns out that the polygraph results are to be used against the defendant, either by reason of disagreement between the court's witnesses and defense experts, or because polygraph experts are offered independently by the Government, his privilege against self-incrimination still will not be infringed. A test cannot be made without the defendant's full cooperation. Thus, if adequate warnings under Miranda v. Arizona, 384 U. S. 436, are given, the taking of the test itself is a waiver of the privilege.

Any way, it is arguable that the privilege is not really involved at all. Coercion to obtain a statement is at the heart the privilege, and a valid polygraph test can involve no coercion. The evidence offered is simply the opinion

of the experts that the witness is or is not telling the truth when he voluntarily makes a statement.

[Text] The trial process very likely will be substantially affected in a number of respects by the use of polygraph opinion in Courts.

It seems likely that fewer cases will reach trial once the use of the polygraph is fully developed by the prosecution and the defense. The validity of polygraph opinions is clearly established and when a method has been developed to assure the check on the defendant's clearance by the examiners, it is likely that more cases will be dismissed. In the same way, when procedures have been opened to permit government use of the polygraph opinion under the checks suggested herein, it appears that the probability of pleas will be increased. In either case, the result is likely to be a benefit both to the innocent and society and will eliminate many cases from the Courts.

The argument that the jury will be displaced by a machine or by a polygraph examiner lacks merit. The jury will make the final determination of guilt or innocence. * * *

Since this is a perjury case, the issue is – was the defendant lying? The opinion of the polygraph examiner based on a properly conducted examination is more than character evidence, it is direct evidence on this point and may be offered by either side regardless of whether the accused takes the stand or puts his character in issue.

In other cases in which the question of the truthfulness of the defendant is less directly involved, e.g. murder, the defendant and the government would be more limited in the use of the opinion. Only if the defendant puts his character in issue or if he took the stand would the use of the testimony be permitted by the government in such cases, Proposed Rules of Evidence for U.S. District Courts, Rule 404, and the defendant could use this testimony only if his character as to truthfulness was attacked in any way, Proposed Rules of Evidence for U.S. District Courts, Rule 608. This result comes about without altering any of the well established rules.

The hearsay problem must be put in context. The questions of the examiner and the answers of the subject are not received in evidence to prove the truth of the fact asserted. They have value and will be received as evidence of the stimulus for the response of the autonomic nervous system of the subject that is being interpreted by the expert, and to identify the opinion with a statement or act otherwise made of done by the subject. * * *

It is clear that a well conducted polygraph examination, including the questions, answers and the recorded responses, is the stuff on which polygraph experts rely. In one sense, the expert is stating his opinion on what he sees, what he hears and what he knows are the psychological responses of the body to statements that are truthful or not truthful. In this sense, he is like a physician who examines a patient and is permitted to express his opinion on the physiological condition of the patient. This has nothing to do with hearsay.

In another sense, he must report to the jury the statements made by the subject so as to make his opinion relevant to the issue in the case, and as a result of his expertise and the tests conducted he must indicate his opinion of the truthfulness of the statement. In this sense the statements supported by the opinion of the expert appear to be hearsay but since the very purpose of the test is to determine truthfulness, the evidence should be admitted as an exception to the hearsay rule because of its high degree of trustworthiness, Proposed Rules of Evidence for the U.S. District Courts, Rule 803 (24). * * *

The evidence of polygraph experts pertaining to the polygraph examination of the defendant and their opinions will be admitted subject to the following terms and conditions:

1. The parties will meet and will recommend to the Court three competent polygraph experts other than those offered by the defendant.

2. The Court will appoint one or more of the experts to conduct a polygraph examination.

3. The defendant will submit himself for such examination at an appointed time.

4. The expert appointed by the Court will conduct the examination and report the results to the Court and to the counsel for both the defendant and the government.

5. If the results show, in the opinion of the expert, either that the defendant was telling the truth or that he was not telling the truth on the issues directly involved in this case, the testimony of the defendant's experts and the Court's expert will be admitted.

6. If the tests indicate that the examiner cannot determine whether the defendant is or is not telling the truth, none of the polygraph evidence will be admitted. *[End Text]* – Joiner, J.

(U.S. v. Ridling; USDC EMich, 10/6/72)

DEFENSE MAY OFFER POLYGRAPH EXPERT'S TESTIMONY

Polygraph testing has emerged from scientific "twilight zone," D.C. federal court says.

A polygraph expert's opinion testimony as to the results of his test of the defendant will be admitted at the defendant's trial on charges arising out of an alleged assault with intent to kill, the U.S. District Court for the District of Columbia holds. The polygraph is now reliable enough as a tool for detecting deception to render admissible expert opinion testimony as to the results of adequate testing. Cross-examination and careful instructions should overcome the danger that the jury might give too much weight to his testimony. (U.S. v. Zeiger, 10/10/72)

Digest of Opinion: *[Text]* The defendant, Errol Zeiger, is charged in a multi-count indictment with having committed, on or about October 9, 1969, an assault with intent to kill while armed, * * * and other related offenses. His counsel sought and was granted a motion for a pre-trial evidentiary hearing on the admissibility of the results of a polygraph examination administered to the defendant on October 21, 1969, by Lt. Hamilton W. Shoop, then a member of the Metropolitan Police Department. Over several days of hearings the defense submitted expert testimony intended to establish a foundation for the admission at trial of testimony of Lt. Shoop regarding the polygraph examination of the defendant.

The Court, after consideration of the entire record including the transcript of the proceedings, as well as the memoranda of counsel concludes that an adequate and sufficient foundation has been established in this case for permitting the presentation of expert testimony on the results of the defendant's polygraph examination at the trial of this proceeding.

The rule governing admissibility of the results of polygraph tests in this Circuit was first established in Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (1923) and has never been disturbed. In that trial proceeding the defendant offered an expert witness to testify on the result of a deception test made upon the defendant. In affirming the trial judges's refusal of the proffer, the court said: "Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from

which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

"We think the systolic blood pressure deception test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development and experiments thus far made." 293 F. at 1013 * * *

Applying the standard promulgated in Frye, the Court is now called upon to determine whether the polygraph currently enjoys general acceptance among the authorities in the field. A preliminary task is to define the phrase "general acceptance." The cases following the Frye rationale have been carefully considered and they offer little guidance. It is observed, however, that acceptance of the polygraph can be meaningfully determined only with respect to a particular purpose for which the device is used and the degree of reliability required for that purpose. There is nearly unanimous recognition that the polygraph can achieve accuracy of better than 50 per cent, but few would accept the proposition that the technique is almost infallible. For the purpose here at issue, Frye requires such acceptance and recognition "as would justify the courts in admitting expert testimony" deduced from a polygraph examination. The general criterion required for the admission of evidence is its relevance or tendency to prove a material fact.

In determining whether the modern polygraph has gained general acceptance, it is appropriate to note the status of the detection of deception at the time of Frye, when polygraphy was adjudged to be in the "twilight zone" between the experimental and demonstrable stages. By 1923 knowledge of the phenomenon of detection of deception, although it dated back nearly 30 years, was apparently confined to a small group of persons who had experimented with detection devices. Some reported a high percentage of accuracy in their results but few credible scientific studies had been published. There was scarcely any discussion of the subject in legal periodicals and the courts had not been afforded opportunity to hear and weigh testimony from the contemporary experts concerning the reliability and the acceptance of the devices.

Today, polygraphy has emerged from that twilight zone into an established field of science and technology. The polygraph has been and continues to be the subject of scientific study and investigation, and although the precise limitations of the device and the intricacies which affect its performance may not be understood to the complete satisfaction of the scientific community, enough is known about it to confirm that it is a useful tool for detecting eception. * * *

A comment is in order concerning the consideration which the Court has given to the opinions of experts who are neither physiologists nor psychologists. Part of the holding in Frye was phrased in terms of "recognition among physiological and psychological authorities" but the general rule established by the case called for "general acceptance in the particular field in which [the polygraph] belongs." Although polygraphy at one time may have been dependent on physiological and psychological authorities for certification of its reliability, it is no longer appropriate to confine consideration solely to those disciplines. Certainly any individuals who have had experience in the specialized area of the polygraph, whether they are medical doctors, scientists, or polygraph examiners, can contribute to the Court's inquiry into the matters of acceptance and reliability. For this reason, testimony by any qualified expert in the field of polygraph concerning studies and experiences with the machine is relevant to questions which are before the Court.

The Court received testimony from several experts during the course of the hearings verifying the reliability to the polygraph. John E. Reid, one of the leading

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authorities in the field, testified that in studies he had recently conducted in collaboration with Frank S. Horvath, an accuracy of better than 91 per cent among experienced examiners was found. He also asserted that in the 1966 edition of his text, Truth and Deception, co-authorized with Fred E. Inbau, a professor of law at Northwestern University, the authors reversed the position on the admissibility of polygraph evidence which they adopted in an earlier work because of significant advances in the field. * * *

Lynn P. Marcy, a polygraph examiner with 15 years of experience, testified that of the 30 per cent of the 8,000 examinations which he conducted and which were subjected to verification through supporting admissions, confessions, or additional evidence, only six known errors were noted. The accuracy of his diagnoses was estimated in excess of 90 per cent.

David C. Raskin, a psychologist who performed research in the areas of psychophysiology, stated that his laboratory studies in simulated field situations showed an agreement among examiners of 95.5 per cent and a rate of correct decisions of almost 82 per cent, which was considered "quite good" for a laboratory situation. * * * Martin T. Orne [University of Pennsylvania] * * * testified for the Government that the true accuracy of the polygraph is not known but that there is agreement in the scientific community that the polygraph works "far better than chance" and that he would place its accuracy at 85 percent or perhaps higher.

The testimony of the experts and the studies appearing in the exhibits lead the Court to believe that the polygraph is an effective instrument for detecting deception. The failure of the Government to demonstrate significant disagreement with this basic proposition, the absence of statistical data pointing to any other conclusions, and the accepted and widespread absorption of the polygraph into the operations of many government agencies, all confirm the Court's conclusion 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 properly used by competent, experienced examiners.

Turning to the polygraph test in this case, the Court must consider the qualifications of Lt. Shoop and the manner in which he administered the examination to the defendant. The examiner's expertise is a most critical factor affecting the reliability and usefulness of a polygraph test. In passing on Lt. Shoop's qualifications, his education, training and experience in the field of polygraphy have been noted and compared with the criteria expressed by the various experts heard by the Court. He received training at the Polygraph Examiners School, Fort Gordon, Georgia in 1962 and has attended several advanced polygraph seminars since that time. He has administered approximately 2,000 polygraph examinations for the Metropolitan Police Department and at the request of several courts in the District of Columbia, our United States Attorney's Office, the Corporation Counsel's Office, the Federal Bureau of Investigation, and law enforcement agencies in Maryland and Virginia. Although he does not possess a college degree, his background, and the expertise which he demonstrated, convince the Court of his proficiency as a polygraph examiner. * * *

While the Court has found the proffer of expert polygraph testimony in this case to be probative, this finding must be qualified by a weighing of the probative value of this evidence against the policy considerations which mitigate against its admission. The problem which has traditionally caused the courts the greatest concern in this regard is the possibility that the jury might consider the examiner's opinion to be so conclusive on the issue of guilt or innocence as to intrude upon and usurp its historical role and prerogatives. The question is whether the feared tendency of the jury to attach exaggerated significance to the examiner's testimony can be controlled. Carefully conducted trial procedure can offer opportunities to alert the jurors to the value and limitations of polygraph technique. It is contemplated that the foundation for the examiner's opinion will be required to include sufficient information to enable the jury to make an intelligent evaluation. Vigorous cross-examination of the examiner and other expert witnesses will expose inadequacies which may have affected the results of a particular examination. Instructions to the examiner and to the jury can also clarify and distinguish the role that each is to play. In the course of his testimony, the examiner will not be permitted to give an opinion on the issue of guilt or innocence, but will be asked to assess the truthfulness of the defendant's answers to factual questions concerning the crime and to explain the basis for his opinion; that is, his analysis of the defendant's physiological responses to the questions. After considering the basis of the examiner's opinion and the other foundational material presented, the jury may perform its customary duty of attaching whatever significance to the opinion that it believes is warranted.

In the final analysis, the determination of whether the proffer of polygraph testimony can be presented so that its value to the truth-finding process overcomes the danger of over-emphasis by the jury resides within the sound discretion of the trial judge. The court should ensure that the jury has been adequately prepared before it allows the examiner to state his conclusions. If these safeguards have been observed, the jury should be able to properly evaluate the ploygraph evidence. [*End Text*] —Parker, J.

(U.S. v. Zeiger; CA DC, 10/10/72)

DECISIONS IN BRIEF

The cases digested have been selected as worth reporting, but are considered suitable for abbreviated treatment. Texts of these decisions are also available for loan to any subscriber on request.

ABORTION

The 75-year-old state abortion statute is constitutional, the South Dakota Supreme Court unanimously holds. The statute provides for punishment of anyone "who administers to any pregnant woman or who prescribe[s] for any such woman or advises or procures any such woman to take any medicine, drug, or substance or uses or employs any instrument or other means with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life." The court notes possibility that the law "reflects a Puritanical view and should be repealed, amended, or modified. But this does not convert the issue into a legal question or render the statute unconstitutional. * * * Its eventual resolution rests entirely in the legislative branch of our government subject only to constitutional restrictions. It involves far more than an individual desire to have an abortion and a willing aborter. The State, in our opinion, has a compelling and legitimate interest to determine when, where, and by

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

-against-

PHILIP DIOGUARDI,

Defendant.

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72-CR-1102

United States Courthouse
Brooklyn, New York

November 27, 1972
10:00 o'clock a.m.

B e f o r e:

HONORABLE JACK B. WEINSTEIN, U.S.D.J.

WINFRED D. LEWIS
OFFICIAL COURT REPORTER

which I can place on the record if your Honor wants.

THE COURT: You'd better.

MR. SLOTNICK: During the course of the defense investigation, your Honor, it appeared to me that the defendant was not guilty and as a result of that it also appeared that there was another individual who was so guilty. In Mr. Druker's absence -- other than these people in New York City last week -- I spoke to Mr. Dillon and indicated to him that there was a possibility that on Monday morning an individual would appear who might indicate to the Government that he was the culprit and that he had done such, and that Mr. Dillon indicated to me that if he did appear there was a possibility the Government might go along with an adjournment or continuance so that there could be further investigation by the FBI.

As he has indicated to me, he's not interested in prosecuting anybody but guilty people.

That did occur this morning. As a result of identification in Mr. Druker's office, the Government felt that they were ready to go to trial,

and they were not interested as far as I know, in further pursuing this witness. As a result of that, I've sort of been caught by surprise, your Honor. There are certain things that I have not been able to do such as, as I've indicated, the handwriting samples. One of the other problems that I have had, your Honor, is that I will be submitting polygraph examinations and tests to your Honor -- of course, your Honor will have to rule them admissible in evidence -- of both individuals. And I would need a short period of time to accomplish that too, and that's why I'm asking your Honor for a short adjournment.

THE COURT: I will go along with it if it fits in with our schedule.

All right, why don't you make your call. We'll have the identification hearing in just a few minutes.

MR. SLOTNICK: May I leave the courtroom on personal business?

THE COURT: Yes.

(Recess had.)

(continued on the next page.)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

-against-

PHILIP DIOGUARDI,

72-CR-1102

Defendant.

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United States Courthouse
Brooklyn, New York

November 30, 1972
11:00 o'clock a.m.

B e f o r e :

HONORABLE JACK B. WEINSTEIN, U.S.D.J.

I hereby certify that the foregoing is a true and accurate transcript from my stenographic notes in this proceeding.

Winfred D. Lewis
Official Court Reporter
U. S. District Court

WINFRED D. LEWIS
OFFICIAL COURT REPORTER

THE COURT: No.

MR. SLOTNICK: Will your Honor allow these to go in before the jury?

THE COURT: Yes, you can put it in. If they want to make comparisons of their own.

MR. SLOTNICK: Your Honor, I have with regard to our second phase of this day, or our first phase of this day, I have flown in Mr. Gordon Barland from West Virginia, who is actually in Utah, but fortunately I located him last night in West Virginia.

He is a psychologist who will give the basis of my polygraph hearing.

If your Honor --

THE COURT: What is the basis of it?

MR. SLOTNICK: The scientific reliability of polygraph.

THE COURT: I don't need that. I know the literature in the field.

What I want to know is who were the experts and what their backgrounds were who took it.

I take judicial notice of the basis of the polygraph material.

MR. SLOTNICK: All right.

Would your Honor allow Mr. Barland to testify as to the qualifications of the expert who did take the polygraph?

Mr. Barland is a noted man in the field.

THE COURT: Yes, all right.

MR. DRUKER: Your Honor, I just thought I would call the Court's attention to the following:

Number one, Mr. Dillon and I last night strongly urged the Department of Justice to give us authorization to have a polygraph done. We were advised that notwithstanding the peculiar facts of this case that the Department refused to get involved in the admission of any polygraph evidence in any case.

Also, I think with regard to the admissibility of the polygraph test, I think Mr. Slotnick cited an Eastern District of Michigan case which relied upon a District of Columbia case and it is my understanding that the Department of Justice appealed the District of Columbia case and that that was reversed, the D.C. Circuit saying that the polygraph should not have been admitted into evidence by the trial judge.

MR. SLOTNICK: It's my understanding, your Honor --

THE COURT: What's the name of the case?

MR. SLOTNICK: Mr. Druker is correct.

THE COURT: United States v. Seiger, Court of Appeals, District of Columbia.

MR. DRUKER: Yes.

MR. SLOTNICK: That's correct.

THE COURT: -- and that was reversed?

MR. DRUKER: That was reversed.

MR. SLOTNICK: It's my understanding the reason it was reversed, your Honor, is not because the Court of Appeals did not like the polygraph, it was because they felt there was some question about this piecemeal procedure at this stage of the game and I think they indicated and I have not seen the original decision, I spoke to an attorney, Nathan Luwin in D.C. who related the following facts to me. It was his understanding that they said, well, if your man is not acquitted, come back.

There was some indication of that.

THE COURT: Well, they must have had a

slipsheet.

MR. DRUKER: I would expect that it would be available in the Court Library, your Honor.

THE COURT: All right, see if you can get it.

In any event, I have read Judge Joiner's opinion.

MR. SLOTNICK: May I also indicate --

THE COURT: And I agree with it generally. There are very grave difficulties in connection with polygraph tests.

One of the serious matters is that if the juries begin to expect polygraphs in every case when the Government does not utilize a polygraph for very good reasons, the defense counsel may argue explicitly or implicitly that that's a reason to find the defendant not guilty.

In addition it would make these trials much more expensive and difficult, so I appreciate the Government's position that they don't want to use them generally.

But the situation here is so unusual that it does seem to me that the Court as well

as the Government and the defendant are entitled to some help, and we may get it from the polygraph material. [illegible] Now, I am going to apply the Proposed Rules of Evidence for United States District Courts and Magistrates which have been adopted by the Supreme Court, subject of course, to Congress' will, even though they are not effective until July.

Pursuant to Rule 201, I take judicial notice of the general background with respect to polygraphs. I don't believe I have to place on the record all of the extensive literature in the field. [illegible]

I have read very widely and I think the material is available, had been available for some years and has been subject to dispute by scholars. [illegible]

I think that Judge Joiner summarizes the situation fairly well in his opinion except that I would modify his opinion somewhat, for example, where he says that, "Your autonomic nervous system is not controllable," I think that has to be read as being not controllable

by most persons.

"Information with respect to alpha waves and other information as to controllability of some of these matters indicate that some people may be able to control some of these aspects of their body operations."

He also says that "A lie is an emergency to the psychological wellbeing of a person, it causes stress."

Again that has to be modified by saying "most people," because there are pathological liars and it may be that some people can train themselves with respect to this matter.

Again, when he says, "Attempts to deceive cause the sympathetic branch of the automonic nervous system to react," that must be limited to "most persons."

So there are a class of persons who present a danger were polygraphs relied upon automatically.

In addition there is to some degree error. There are some people under some conditions who do not respond adequately enough.

The critical problem with respect to

polygraphs is the capacity of the person who is giving the test.

The difficulty with the field is that there are many untrained people. This is not the kind of scientific test thatcan be read the way a radar indicator can be read or the way a thermometer can be read.

You can't read these things off directly. The conclusion depends upon a very sophisticated analysis of psychological, mechanical and physiological factors.

Nevertheless, under Rule 702 and 703 and 705 of the Proposed Rules of Evidence, it's fairly clear that the Court has discretion where, to quote Rule 702, "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. A witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise."

The question of whether the man is sufficiently qualified to be helpful to the jury is a decision the Court must make.

If I decide that the expert is sufficiently qualified then under Rule 705 the expert may testify with respect to the basis for his opinion, which in this case would be the nature of the polygraph tests.

These rules, of course, are subject to Rule 403, which permits the Court a great deal of discretion to exclude relevant evidence where it's probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading a jury.

And as matters now stand, my position with respect to most cases would be to exclude polygraph evidence even that given by people recognized as experts.

As I say, however, the facts in this case are so unusual that I believe this information may be helpful, provided the experts are in my opinion extremely qualified and in my opinion, based upon the evidence before me and the material of which I take judicial notice, the tests have been given in the proper way.

I would therefore permit the defendant to submit evidence with respect to the expertise

of the witnesses whom he proposes to present and with respect to the way the tests were given.

MR. SLOTNICK: Your Honor, with regard to Seiger, the Court of Appeals in the District of Columbia wrote no opinion. No opinion was filed. That's why I was not aware of it. And no opinion will be filed.

Mr. Seiger was acquitted and as a result thereof, the appeal is moot.

THE COURT: Well, I believe that the discretion of the Trial Court in these matters under the Proposed Rules as well as under general principals of evidence in the administration of trials is extremely broad and I suspect that is why an opinion was not written.

Proceed with your witness.

THE COURT: All right, we will take a break.

Get your witness.

MR. SLOTNICK: I just want to tell them what's happening.

THE COURT: I have to break a little after 12:00.

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