IN THE SUPREME COURT OF FLORIDA

CHARLES SEATON DAVIS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO.69,677

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida, and the Appellant in the District Court of Appeal, Fourth District. Respondent was the prosecution and Appellee in the lower courts. In the brief the parties will be referred to as they appear before this Honorable Court.

STATEMENT OF THE CASE AND FACTS

Petitioner, the manager of a restaurant, was charged with failing to deposit daily business receipts on fourteen different occasions between October 29, 1982 and January 27, 1983 (R211, 650).

Petitioner testified that he took the receipts to the bank and made the deposits, but did not inspect the deposit receipts and thus, could not explain why the money did not show up in the restaurant's accounts. Petitioner postulated that bank tellers had embezzled the money (R531-33, 556, 617).

In its case, the state adduced testimony from a polygraph examiner as to the results of a polygraph administered to Petitioner. Prior to the test,the parties had orally stipulated that the results would be admissible at trial. The examiner qualified as an expert and testified that Petitioner failed the test and answered deceptively to the key questions. Petitioner objected to any questions directed towards explaining the theory and workings of the polygraph on the grounds that the stipulation only addressed the results (R305-06). That objection was overruled (R306-07) and the examiner gave testimony regarding: his qualifications, the theory of the polygraph, a step by step review of the examination in this case, the reliability of the polygraph in general and in comparison with other forensic sciences, the calibration and maintenance of the machine, and exhibited the polygram (R303-318).

At the close of the evidence, Petitioner requested a limiting instruction on the reliability of the polygraph and the weight to be given such evidence (R567-8). The trial judge

denied the request (R568-9) and instead, gave the standard jury instruction on expert witnesses (R635). Both parties argued at length about the polygraph results in closing argument (R585-86, 604-06, 627-28). The jury returned a verdict of guilty as charged.

On December 12, 1984, a panel of the Fourth District reversed petitioner's conviction. The panel reasoned that while Petitioner's request was negative and argumentative, the trial judge should have given a proper jury instruction on the polygraph evidence because of its "singular importance in a case of this nature."

The en banc court entertained a motion for rehearing . On November 1, 1985 that court requested supplemental amicus curiae briefs from the State Prosecutor's Association and the Florida Public Defender's Association. On October 22, 1986, the en banc court reversed the panel opinion and reinstated Petitioner's conviction. The en banc court held that a stipulation to the admissibility of polygraph evidence only waives a party's evidentiary objections as to admissibility and does not preclude attacks on the reliability of the results. It further held that a party is entitled to a limiting instruction on request. However, the en banc court held that Petitioner's request "was not proper" and therefore, the trial judge was not required to fashion a proper instruction. The en banc court relied specifically on Taylor v. State, 350 So.2d 13 (Fla. 4th DCA 1977) and Carron v. State, 414 So.2d 288 (Fla. 2nd DCA 1982), aff'd 427 So.2d 192 (Fla. 1983). Then, the en banc court certified the following, as a question of great public importance:

WHEN POLYGRAPH EVIDENCE IS ADMITTED BY STIPULATION, AND A PARTY REQUESTS A PROPER INSTRUCTION ON THE SCIENTIFIC UNRELIABILITY OF POLYGRAPH RESULTS, IS IT REVERSIBLE ERROR FOR THE TRIAL COURT TO FAIL TO SO INSTRUCT THE JURY?

This appeal follows.

SUMMARY OF THE ARGUMENT

Petitioner was entitled to a limiting instruction on the reliability of, and the weight to be given, polygraph results. Petitioner's request was a natural response to the state's efforts to bolster the reliability of the polygraph. Moreover, there is nothing in the stipulation which precludes a right to seek, and get, a limiting instruction. The entitlement to such an instruction is supported by the weight of authority from other jurisdictions.

Contrary to the suggestion of the en banc court, Petitioner's requested instruction was proper - it addressed the relevant concerns and was proposed in a flexible manner to make easier the judge's task. The trial judge rejected any limiting instruction because of fear that it would be an indirect comment on the evidence.

Finally, this case illustrates the many pitfalls of polygraph evidence in general and calls for this Court to re-evaluate the admissibility of polygraph evidence in general. This re-evaluation is supported by: the practical concerns in managing the admission of such evidence, the policy implications of permitting such evidence in criminal trials and the recent trend in other jurisdictions.

ARGUMENT

WHEN POLYGRAPH EVIDENCE IS ADMITTED BY STIPULATION, AND A PARTY REQUESTS A PROPER INSTRUCTION ON THE SCIENTIFIC UNRELIABILITY OF POLYGRAPH RESULTS, IT IS REVERSIBLE ERROR FOR THE TRIAL COURT TO FAIL TO SO INSTRUCT THE JURY

This case involves one of the thorny problems that commonly arise in cases where stipulated polygraph results are admitted into evidence at trial. Simply put, the issue in this case is the extent to which such a stipulation restricts the parties at trial. This issue, then, concerns the extent, if any, that a party can bolster, or attack, the reliability of stipulated polygraph results and, the right, if any, to an instruction regarding the effect of such evidence. The sequence of events in this case, recent precedent from other jurisdictions and the problems inherent in stipulations and polygraph examinations require, at a minimum, that Petitioner was entitled to his properly requested limiting instruction. Moreover, these same considerations call into question the advisability of admitting polygraph evidence in any case.

A. ENTITLEMENT TO AN INSTRUCTION

Ordinarily, this case would be controlled by two basic rules regarding instructions in criminal cases: one, it has long been the law in Florida that the trial judge is obligated to give instructions to the jury on the law applicable to the facts proven at trial. Austin v. State, 40 So.2d 896, 897 (Fla. 1949). See also Matter of Use by Trial Courts of Standard Jury Instructions, 431 So.2d 594 (Fla. 1981) (approval of amendments to

instructions does not relieve the trial judge of his responsibility to instruct the jury properly in each case); Shannon v. State, 463 So.2d 589 (Fla. 4th DCA 1985) (it is the duty of the trial judge to give full, coherent and comprehensible instructions on applicable principles of law). There can be no doubt that this issue was prominent at trial - the state's case was entirely circumstantial and the polygraph results were the only direct evidence of Petitioner's guilt. Furthermore, there was the conspicuous[1] testimony of the polygraph examiner (R303-338) and lengthy arguments by both counsel (R585-86, 604-06, 627-28). Secondly, the established rule that a criminal defendant is entitled to an instruction on the law applicable to his theory of defense, see Palmes v. State, 397 So.2d 648 (Fla. 1981); Johnson v. State, 484 So.2d 1347 (Fla. 4th DCA 1986), is implicated as well. Here, Petitioner's defense[2] was necessarily premised on an attack of the inculpatory polygraph results. Defense counsel's argument is a testament to the importance of this issue to the defense.

Of course, this issue is not so easily disposed - there are other considerations which this Court must weigh:

1. A stipulation to admissibility is not a waiver of right to challenge reliability.

In large part, the problem in this case is the apparent anomaly of a party stipulating to the admission of polygraph results on the one hand,and then, on the other hand, challenging that same evidence at trial by seeking a limiting instruction.

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1 Detective Rios was the state's second witness and was called immediately after the victim.

2 Petitioner took the stand and wholly denied any involvement in the alleged theft (R527-557).

This raises concerns that criminal defendants could "[have their] proverbial cake and eat it, too." (p.3, Brief of Amicus Curiae, Florida Prosecuting Attorneys Association, filed with the en banc court below). Nonetheless, such a view ignores the facts of this case and relevant Florida law.

Initially, much of the theoretical arguments raised in this cause is based on the notion that it was Petitioner who unfairly betrayed the stipulation. If true, this would help support a finding that there was a waiver in fact. However, the unmistakable reality is that it was the state, over Petitioner's objection (R305-06), that sought to, and did, go beyond the stipulation in an attempt to bolster the reliability of the polygraph results. Thus, it was the state that elicited direct testimony from the polygraph examiner regarding: the theory of the polygraph, the extensive qualifications of the examiner, the polygram (the charts used by the examiner to help form an opinion), the reliability of polygraphs in general, and in comparison to other forensic sciences, a step by step review of the "scientific" process used in this case,and the proper calibration and maintenance of the polygraph machine (R303-18). In short, the state wanted, and got, much more than the fact that Petitioner failed the polygraph. This tactic was successfully employed despite the efforts of defense counsel - counsel precisely and repeatedly objected to the state going beyond the scope of the stipulation (R305-07). On these facts, it is hard to see how the state can now be heard to complain about Petitioner's necessary response to limit the effect of this barrage of extraneous evidence introduced by the state. Thus, defense

counsel's request was a defensive, responsive action to the state's evidence of reliability of the polygraph. The equitable balance weighs in favor of Petitioner, not the state.

Besides this sequence of events, Florida law supports Petitioner's entitlement to an instruction. First, there is no indication that the stipulation expressly prohibits either party from seeking an instruction. That is, a strict reading of the stipulation does not preclude an attempt to get a limiting instruction.[3] A narrow reading of the terms of a stipulation in this context has long been the rule in Florida, see e.g. Moore v. State, 299 So.2d 119 (Fla. 3rd DCA 1974) (defendant was allowed cross-examination of examiner regarding reliability of the polygraph machine, but not the examiner's qualifications, by the express terms of the stipulation); State v. Cunningham, 324 So.2d 173 (Fla. 3rd DCA 1975) (admissions made during polygraph testing regarding crimes other than the one being tested for, are beyond the scope of the stipulation); State v. Fuller, 387 So.2d 1040 (Fla. 3rd DCA 1980) (where the stipulation was that if the test results were inconclusive then the results would be inadmissible, and the results were in fact inconclusive, the state is precluded from introducing pre-test admissions); Brown v. State, 452 So.2d 122 (Fla. 1st DCA 1984) (a pre-prosecution stipulation is construed to waive objection only to investigative use and does not waive objection to use at trial); Anderson v. State, 11 FLW 2509 (Fla. 1st DCA 1986, opinion issued December 2,

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[3] Interestingly, the state attorney interpreted the oral stipulation broadly in one sense - that it implicitly contemplated admission of extraneous evidence of reliability (R306a) - but narrowly in another sense - that it prohibits an instruction on such evidence (R567-8).

1986) (where stipulation does not specifically limit polygraph evidence to credibility, it will not be so construed), and plainly supports Petitioner's position.

Secondly, the Fourth District (hereinafter referred to as "4th DCA"), correctly analyzed Florida law to the effect that a "stipulation waives any evidentiary objection based upon scientific unreliability which would preclude admissibility but it does not preclude counsel from adducing evidence of scientific unreliability and commenting thereon during argument." Davis v. State, 11 FLW 2238, 2238-39 (Fla. 4th DCA 1986, opinion issued October 22, 1986). The 4th DCA based its conclusion on specific language from Delap v. State, 440 So.2d 1242, 1247 (Fla. 1983):

> The use of a polygraph examination as evidence is premised on the waiver by both parties of evidentiary objections as to lack of scientific reliability. The evidence fails to show that the polygraph examination has gained such reliability and scientific recognition in Florida as to warrant its admissibility. The Florida rule of inadmissibility reflects state judgment that polygraph evidence is too unreliable or too capable of misinterpretation to be admitted at trial. However, the court does recognize that the parties may waive their evidentiary objection. (emphasis supplied by the 4th DCA).

11 FLW at 2239. This view is consistent with Florida's historical distrust of polygraph evidence, see Kaminski v. State, 63 So.2d 339 (Fla. 1952), and sensibly demarks the contour of the stipulation as a waiver of objection to the validity of the basic, general theory of the polygraph. State v. Grier, 300 S.E.2d 351, 359 (N.C. 1983). Therefore, a stipulation only eliminates the necessity, or opportunity, for the parties to

establish the foundation necessary to satisfy the trial judge. State v. Dean, 307 N.W.2d 628, 637 (Wis. 1981). The Supreme Court of North Carolina put it this way:

> The stipulation is, then, based on principles of consent and waiver and does not even purport to deal with the difficult questions respecting the reliability of the polygraph as an accurate means to detect deception. It simply cannot logically be argued that any foundation as to accuracy is achieved by stipulation.

State v. Grier, 300 S.E.2d at 359. Thus, a party reserves a right to challenge adverse polygraph evidence through cross-examination, presentation of witnesses and a limiting instruction unless specifically waived. Delap v. State, supra; State v. Grier, supra; State v. Dean, supra.

2. The weight of authority from other jurisdictions supports petitioner.

The use of polygraphs at trial has engendered a multitude of decisions and commentaries. See State v. Dean, 307 N.W. 2d at 631 n.2. The majority view[4] wholly prohibits the admission of

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[4] The following states bar any polygraph evidence: Pulakis v. State, 476 P.2d 474 (Alaska 1970); People v. Anderson, 647 P.2d 354 (Colo. 1981); State v. Antone, 615 P.2d 101(Haw. 1980); People v. Baynes, 430 N.E. 2d 1070 (Ill. 1981); Penn v. Commonwealth, 417 S.W. 2d 258 (Ky. 1967); State v. Catanese, 368 So.2d 975 (La. 1979); State v. Gagne,343 A.2d 186 (Me. 1975); Akonom v. State, 394 A.2d 1213 (Md.App. 1978); People v. Barbara, 255 N.W. 2d 171 (Mich. 1977); State v. Anderson, 379 N.W. 2d 70 (Minn. 1985); State v. Biddle, 599 S.W. 182 (Mo. 1980) (en banc); Jordan v. State, 365 So.2d 1198 (Miss. 1978); State v. Beachman, 616 P.2d 337 (Mont. 1980); State v. Steinmark, 239 N.W. 2d 495 (Neb. 1976); State v. French, 403 A.2d 424 (N.H. 1979); State v. Grier, 300 S.E. 2d 351 (N.C. 1983); State v. Yodsnukis, 281 N.W. 2d 255 (N.D. 1979) (admissible only on motion for new trial); Fulton v. State, 541 P.2d 871 (Okla.Cr.App. 1975); Commonwealth v. Brockington, 455 A.2d 627 (Pa. 1985); Rutledge v. St. Paul Fire and Marine Ins. Co., 334 S.E. 2d 131 (S.C.App. 1985);State v. Muetze, 368 N.W. 2d 575 (S.D. 1985); State v. Land, 681 S.W. 2d 589 (Tenn.Cr.App. 1984); Robinson v. State, 550 S.W. 2d 54 (Tex.Cr.App. 1977); Odum v. Commonwealth, 301 S.E. 2d 145 (Va. 1983); State v. Frazier, 252 S.E. 2d 39 (W.Va. 1979); State v. Dean, 307 N.W. 2d 628 (Wis. 1981). Rhode Island admits such

polygraph evidence, while a significant minority[5] allows such evidence on stipulation. Only one state admits such evidence without a stipulation. See State v. Dorsey, 539 P.2d 204 (N.M. 1975). But see N.Mex.R.Evid. 707(1983) (putting significant restrictions on such evidence). These results mirror the traditional judicial skepticism of the polygraph, present since it was first introduced in courts. The only exception to the general prohibition is where both parties have agreed, by stipulation, to gamble on the results. Courts typically approve this limited exception on the basis of either waiver or estoppel and the fulfillment of conditions calculated to enhance the reliability of the polygraph and limit the prejudicial effect of such evidence. See 53 ALR 3d 1005, "Admissibility of Lie Detector Test Taken Upon Stipulation That The Result Will be Admissible In Evidence."[6] Moreover, the commentators uniformly concede that, if polygraph evidence is to be admitted, then a

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evidence only as to matters of credibility, Powers v. Carvalho, 281 A.2d 298 (R.I. 1971), and Oregon generally bars such evidence but has left open the possibility that such evidence is admissible by stipulation. State v. Brown, 687 P.2d 751 (Ore. 1984).

5 The following states allow polygraph evidence by stipulation: Wynn v. State, 423 So.2d 294 (Ala.Cr.App. 1982); State v. Valdez, 371 P.2d 894 (Ari. 1962); State v. Bullock, 557 S.W. 2d 193 (Ark. 1977); People v. Trujillo, 136 Cal.Rptr. 672 (Cal.App. 1977); State v. Sain, 372 A.2d 144 (Conn. 1976); Williams v. State, 378 A.2d 117 (Del. 1977); Codie v. State, 313 So.2d 754 (Fla. 1975); State v.Chambers, 239 S.E. 2d 324 (Ga. 1977); Owens v. State, 373 N.E. 2d 913 (Ind.App. 1978); State v. Losee, 354 N.W. 2d 239 (Iowa 1984); State v. Lassley, 545 P.2d 383 (Kan. 1976); Commonwealth v. Vitello, 381 N.E. 2d 582 (Mass. 1978); Corbett v. State, 584 P.2d 704 (Nev. 1978); State v. McDavitt, 297 A.2d 849 (N.J. 1972); State v. Souel, 372 N.E. 2d 1318 (Ohio 1978); State v. Rebeterano, 681 P.2d 1265 (Utah 1984); State v. Ross, 497 P.2d 1343 (Wash.App. 1972); Cullin v. State, 565 P.2d 445 (Wyo. 1977).

6 This general survey is helpful in a theoretical sense but is not, in the opinion of this writer, complete and abreast of recent trends.

limiting instruction is essential. Note, "The Emergence of the Polygraph at Trial", 73 Col.L.Rev. 1120, 1125-28 (1973); Reid and Inbau, Truth and Deception, at 331; Note, "Polygraph: Short Circuit to Truth?", 29 U.Fla.L.Rev. 286, 304 (1978); F.Inbau, A. Moenssens, L. Vitullo, Scientific Police Investigation, at 169 (1972).

The import of this body of law for this Court is simple - if this Court opts to continue to admit such evidence (see subsection C, infra), then at a minimum a limiting instruction must be given. To hold otherwise is to put Florida in an extreme minority[7] and permit demonstrably unreliable evidence to determine judicial outcomes without any judicial guidance. Fairness and policy demand a more cautious approach.

B. PETITIONER PROPERLY REQUESTED A LIMITING INSTRUCTION

At trial, defense counsel requested the following instruction:

> 1) The polygraph test is based on psychological theories not susceptible to readily available clear cut proof. Numerous factors can influence the validity of polygraph testing, such as the skill of the operator, the emotional state of the person tested, the fallibility of the machine. Factors other than conscious deception can cause deviant autonomic responses. Frustration, surprise, pain, shame, and embarrassment, as well as other idiosyncractic responses incapable of being analyzed can cause autonomic responses.
>
> 2) The polygraph is not a sufficiently reliable or valid instrument to warrant its use in judicial proceedings unless both sides agree to

[7] This writer has found only four other states that allow stipulated polygraph evidence with no conditions. See Williams v. State, supra (Del.); State v. Losee, supra (Iowa); State v. Lassley, supra (Kan.); Cullin v. State, supra (Wyo.). Technically, Florida is presently in this minority, but the issue has never been raised in this Court.

> its use, and even then, it is not conclusive, but is only 1 piece of evidence entitled to whatever weight it is assigned by the fact finders, you the jury.
>
> 3) A mechanical devise cannot substitute for the time-tested, time-tried, and time-honored discretion of the judgment of a jury as to matters of credibility.

Counsel fashioned this request from applicable decisions of this Court.[8] (R567-8). The state attorney "strenously" objected and the trial judge denied the request on the basis that such an instruction "would be an indirect comment on the evidence by the Court which I cannot do" and that the standard instructions and closing argument would suffice (R569).

Initially, a panel of the 4th DCA reversed Petitioner's conviction for failure to give the requested instruction. The panel held:

> Adverting to [Petitioner's] requested instruction, we find it to be argumentative, misleading, and far too negative and thus do not fault the trial judge for not giving the instruction as proposed. However, since the defense requested an instruction on the subject that we recognize to be of singular importance in a case of this nature,we believe the trial judge should have given the jury proper instruction thereon so that the jury would have an understanding of the weight to afford such evidence.

P. 3-4, of the panel opinion. Subsequently, the en banc court agreed that normally such evidence requires an instruction but reversed the panel decision because "the instruction requested was not proper,"11 FLW at 2240, on authority of Taylor v. State, 350 So.2d 13 (Fla. 4th DCA 1977) and Carron v. State, 414 So.2d

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[8] Paragraphs (1) and (2) were taken verbatim from Farmer v. City of Fort Lauderdale, 427 So.2d 187, 190 (Fla. 1983), and Paragraph (3) was taken from Kaminski, 63 So.2d at 341.

288 (Fla.2d DCA 1982), aff'd 427 So.2d 192 (Fla. 1983). The en banc opinion misapprehends the events at trial and avoids the clear language of the instruction and the policy implications of its holding.

The apparent concern of the 4th DCA, and the cases on which it relies, is that trial judges should not bear the burden of fashioning instructions on issues of first impression. Petitioner agrees with this general concern and submits that defense counsel fulfilled her obligations in this regard. Facing an issue of first impression is as trying on trial counsel as it is on trial judges. Here, counsel did what she could - she established the need for the instruction and informed the court of the relevant legal principles. See Bacon v. State, 346 So.2d 629 (Fla. 2d DCA 1977). Counsel cannot be reasonably expected to divine the precise contours of this controversial issue of first impression. Moreover, defense counsel was flexible in her proposal and intentionally put her instruction in three, distinct, severable parts and explicitly informed the court she would accept any of the subsections or any modifications thereof (R567-68). Thus, contrary to the suggestion of the en banc opinion, counsel was not attempting a "gotcha" ploy - she sincerely wanted an instruction and not a win on appeal.

The en banc opinion also suggests that the trial court did not disagree with the legal principles proposed by Petitioner, but rather, was only troubled by the particular language of Petitioner's requested instruction. That is, the plain implication is that the trial judge was diligently trying to fulfill its obligations and only rejected the instruction because of its

argumentative and misleading nature. The record reflects the exact opposite of this suggestion - the trial judge rejected the instruction solely because it did not want to indirectly comment on the evidence (R568). The trial judge's intent and approach is unmistakable - there should never be an instruction on polygraph evidence. This stance is precisely what the en banc court, and the weight of authority from other jurisdictions [see (A)(2) infra], hold to be improper - the admission of polygraph evidence should always result in a limiting instruction on the request of counsel. Thus, the trial judge's actions in this case need correction, not sympathetic understanding.

Moreover, Petitioner's requested instruction addresses the concerns identified by the en banc court:

> the jury should be apprised of the strengths and weaknesses of such evidence, what the results are calculated to determine, and that it is for them to determine what weight and effect should be attributed to such evidence.[9]

11 FLW at 2239. A comparison of these concerns and Petitioner's instruction, infra, readily evidences close similarity. Both seek to inform the jury that: there are a multitude of factors that cause autonomic responses; a polygraph only measures physical responses; and that such evidence is only one piece of evidence and is not conclusive of the jury's task. Petitioner readily concedes that the tone of the request is mildly argumentative, but submits that this is only due to the inherent debate

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[9] The en banc court relied heavily on State v. Valdez, supra, and State v. Griggs, 656 P.2d 529 (Wash.App. 1982), and, in effect, joined the courts that have adopted the Valdez approach. The stated concerns are merely a restatement of the oft-repeated Valdez requirements. See 371 P.2d at 900-01.

that polygraphs engender. None of the statements in the proposed instruction are not true. Furthermore, the instruction tracks the relevant concerns identified in Valdez. Particularly in light of defense counsel's offer to make the separate paragraphs severable, it is hard to fathom how counsel's request was off the mark.

Finally, this Court should consider the policy implications of holding that defense counsel's efforts were deficient in this case. By requiring defense counsel to submit precisely correct instructions on issues of first impression, this Court makes clear that the first party to venture into new areas of the law has little,if any, likelihood of success. This approach calls for a crystal ball and discourages advances in the law. More importantly, this approach anomalously denies relief to the very party that had the foresight and fortitude to raise the issue. Fairness and logic require more.

C. RECONSIDERATION OF THE ADMISSIBILITY OF POLYGRAPH EVIDENCE

There is another basis for reversal of Petitioner's conviction which this Court can, and should, consider - polygraph evidence should not be admissible in Florida, stipulation or not. That is, Petitioner invites this Court[10] to employ the analogous reasoning used in Bundy v. State, 471 So.2d 9 (Fla. 1985) (Bundy II) and reexamine Florida's rule of limited admissibility by stipulation, see Codie v. State, 313 So.2d 754 (Fla. 1975); Johnson v. State, 166 So.2d 798 (Fla. 2nd DCA 1964), and join the growing numbers of jurisdictions that have recently adopted a per

[10] This argument was not raised at trial nor on appeal to the 4th DCA.

se rule of inadmissibility of polygraph evidence. See Fulton v. State, 541 P.2d 871 (Okla.Cr.App. 1975); People v. Barbara, 255 N.W. 2d 171 (Mich. 1977); Akonom v. State, 394 A.2d 1213 (Md.App. 1978); State v. Frazier, 252 S.E. 2d 39 (W.Va. 1979); State v. Biddle, 599 S.W. 2d 182 (Mo. 1980) (en banc); State v. Dean, 307 N.W. 2d 628 (Wis. 1981); People v. Anderson, 637 P.2d 354 (Colo. 1981) (en banc); State v. Grier, 300 S.E. 2d 351 (N.C. 1983); Odum v. Commonwealth, 301 S.E. 2d 145 (Va. 1983); State v.Land, 681 S.W. 2d 589 (Tenn.Cr.App. 1984); Rutledge v. St. Paul Fire and Marine Ins. Co., 334 S.E. 2d 131 (S.C.App. 1985); Commonwealth v. Brockington, 455 A.2d 627 (Pa. 1985).

Preliminarily, it is beyond dispute that the stipulation in this case does not control this question of law. Massachussetts Bonding and Ins. Co. v. Bryant, 175 So.2d 88 (Fla. 1st DCA 1965), aff'd 189 So.2d 614 (Fla. 1966); Clark v. Munroe, 407 So.2d 1036 (Fla. 1st DCA 1981). As the United States Supreme Court noted, "the proper administration of the criminal law cannot be left merely to the stipulation of the parties." Young v. United States, 315 U.S. 257, 259 (1942). Accord Schriver v. Tucker, 42 So.2d 707, 709 (Fla. 1949); Akonom v. State, 394 A.2d at 1216. This is especially so in this context for, this Court has an obligation to avoid "the substantive hypocrisy and miscarriage of justice that results when an innocent person is convicted of a crime." 1 Wigmore, Evidence §7a, p.603-04 n.35 (Tillers rev. 1983). See also Akonom v. State, 394 A.2d at 1216 n.3. Thus, it is for this Court to independently decide this important question. Considerations of policy and practice must inform that decision.

1. **Unreliability and Prejudicial Effect.**

Petitioner submits that the nature and effect of the polygraph is to overwhelm the fact finding process of a trial by jury and that, as a matter of public policy, this Court cannot tolerate such a perversion of our judicial system.

Judicial skepticism of the polygraph surfaced in the seminal case of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). This Court first recognized the problems inherent in polygraph examinations in Kaminski v. State, supra. That fundamental distrust has not wavered. See Farmer v. City of Fort Lauderdale, supra; Delap v. State, supra; Bundy v. State, 471 So.2d 9 (Fla. 1985). This skepticism is more than a myopic fear -

> recurring questions of validity [the degree to which a test predicts or measures accurately that which it is supposed to predict or measure] and reliability [the degree to which a test consistently yields the same results regardless of the accuracy of the predictions] of the polygraph as an instrument capable of detecting deception create a number of issues.

People v. Anderson, 637 P.2d at 358. These issues are commonly recognized by the courts, commentators, and scientists and include:

- No verification that there is a measurable relationship between conscious deception and a person's physiological state. People v. Anderson, 637 P.2d at 358; People v. Barbara, 255 N.W. 2dat 187. See also 73 Col.L.Rev. at 1121-24 (1973); 29 U.Fla-.L.Rev. at 292-94; B. Kleinmuntz, "Trial by Polygraph: A Costly and Destructive Way of Detecting 'Truth'", Trial (Sept. 1985) p.34; V.S. Alpher and R.L. Blanton, "The Accuracy of Lie Detection: Why Lie Tests Based on the Polygraph Should Not be

Admitted Into Evidence Today", 9 Law and Psychology Rev. 67-75; D.C. Raskin, "The Polygraph in 1986: Scientific, Professional and Legal Issues Surrounding Application and Acceptance of Polygraph Evidence", 1986 Utah L.Rev. 29, 31. From 1895, when Cesare Lombroso initiated development of the lie detector machine, to the more advanced modern machine of today, the basic theory has remained unchanged - "that there is an uncontrollable physiological reaction to lying that can be measured by mechanical instruments attached to the body." 73 Col.Rev. at 1121. At least one psychophysiologist[11] has characterized the assumption "that someone who becomes emotionally upset when asked about the facts of a case must be lying" as "as simplistic as simple." Kleinmuntz, at 34.[12] This fundamental challenge to the theoretical basis for the polygraph has been "longstanding" and yet, despite many efforts to substantiate its tenets, it remains true that there is no demonstrable evidence linking lying and emotion or emotional change and physiological response. People v. Barbara, 255 N.W. 2d at 187-88.

- There is a significant problem with the qualifications of the majority of examiners. People v. Barbara, 255 N.W. 2d at 192; State v. Biddle, 599 S.W. 2d at 189; State v. Dean, 307 N.W. 2d at 632; State v. Grier, 300 S.E. 2d at 355-56. Originally, in 1964, Professor Inbau opposed the admission of polygraph evidence because, in his opinion, 80% of the examiners did not measure up

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[11] Other psychophysiologists decry the attempt of polygraphers to pose as experts on psychological processes such as deception. 9 Law and Psychology Rev. at 74.

[12] Kleinmuntz also persuasively notes that there is no reason to assume that humans emit a pattern of physiological traces only when lying and do not emit them when they tell the truth. Trial at 34.

to the necessary standards. People v. Barbara, 255 N.W. 2d at 192. Now, Reid and Inbau favor admission of polygraph evidence but still note, "Many persons functioning as Polygraph examiners do not possess [the necessary] basic qualifications." Reid and Inbau, Truth and Deception, (2d.ed. 1977) p.304. The basic qualifications suggested by Reid and Inbau are: a good practical understanding of human nature, suitable personality traits, and a rigorous, intensive training period, on the theory and practice of the polygraph, for at least six months. Id. at 304-05.[13] These are necessary to be able to perform several complex functions: reading the instrument, formation and delivery of questions, detection of outwardly incriminating signs, and responding to an uncooperative subject. 29 U.Fla.Rev. at 299-303. Undoubtedly, the influence of the examiner is critical to the proper functioning of the machine. People v. Barbara, 255 N.W. 2d at 192; State v. Biddle, 599 S.W. 2d at 189; State v. Dean, 307 N.W. 2d at 632; State v. Grier, 300 S.E. 2d at 355-56. Nonetheless, while there is a critical need to upgrade examiner training and qualifications, prospects for that occurring are dim

[13] Section 493.566, Florida Statues (1986), requires that an applicant: be at least 21 years of age, a United States citizen, of good moral character, successfully complete 2 years of junior college (which can be waived where the applicant has 2 years of experience as an investigator or detective), completion of a 6 week training course at an approved school, completion of a 1 year internship under a licensed examiner, and has passed an examination promulgated by the Department of State. However, examiners employed by a "municipal, county, state, or federal agency" are exempt from these qualifications in the performance of their official duties. §493.562, Fla.Stat. (1986).

- too often polygraphers mistakenly (and defensively) interpret these valid criticisms as an attack on the polygraph technique.[14] Raskin, 1986 Utah L.Rev. at 69.

- There are significant questions regarding the fallibility of the polygraph instrument. People v. Barbara, 255 N.W. 2d at 190; Akonom v. State, 394 A.2d 1213, 1218 (Md.App. 1978); State v. Biddle, 599 S.W. 2d at 190. Some studies done yield accuracy rates from 75% to 99%, See 29 U.Fla.L.Rev. at 290 [citing figures from State v. Stanislawski, 216 N.W. 2d 8, 12 n.12 (Wis. 1974]; Raskin, 1986 Utah L.Rev. at 55-59 (77%-92% confidence in deceptive outcomes and 91%-97% confidence in truthful outcomes[15]), while other studies suggest lower rates. See Kleinmuntz, Trial at 36-7 (citing figures from at 7 studies with ranges from 50% to 70% accuracy). Moreover, studies done by proponents of the polygraph are typically subject to a basic flaw - the figures are supplied by polygraphers and usually lack verification by relevant scientific disciplines. Aknonom v. State, 394 A.2d at 1218; State v. Frazier, 252 S.E. 2d 39, 44 n.4

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[14] Apparently, the Florida legislature recognizes these serious problems - in 1986 the legislature added requirements that: the applicant pass an examination before being licensed, detection of deception schools be licensed, licensees must notify the Department of State when changing their location of business, prohibit assignment of licenses, all records of any examination given be kept for a period of 2 years, require the Department of State to establish standards for detection of deception examinations, and increase the penalty for violating this section by including a 5 year suspension of license. This is a substantial revision of prior law. Compare §493.561 et seq, Fla.Stat. (1985). These revisions do not imply approval of polygraph evidence in the courts - the 1986 legislature adhered to its judgment that polygraph evidence is inadmissible in any judicial proceeding, by leaving intact §493.577 (1985).

[15] Few studies make a distinction between deceptive outcomes and truthful outcomes, and this is a fundamental flaw. Raskin, 1986 Utah.L.Rev. at 55-57.

(W.Va. 1979). See also Kleinmuntz, Trial at 35 (typical problem with studies is only citing "correct guilty detections" and failing to include "incorrect guilty detections"and "innocent detections").

- Factors other than conscious deception can cause deviant autonomic responses. Farmer v. City of Fort Lauderdale,427 So.2d at 191. See also People v. Barbara, 255 N.W. 2d at 192; People v. Anderson, 637 P.2d at 359; State v. Biddle, 599 S.W. 2d at 190. Reid and Inbau note these factors: lack of concern about detection, extreme emotional tension, overanxiety, anger, involvement in other similar acts or offenses, concern of neglect of duty, physical discomfort, excessive interrogation prior to test, excessive number of test questions, adrenal exhaustion, rationalization and self deceit, inadequate question phraseology, and physiological and mental abnormalities. Reid and Inbau, Truth and Deception, at 215-250. Another influence involves situations where an incarcerated defendant consents to, and takes, a polygraph - the conditions under which consent is given, and the test taken, can be a factor in producing results unfavorable to the defendant. People v. Barbara, 255 N.W. 2d at 196 n.41. And, most importantly,recent research indicates that the use of physical "counter measures" (ie. biting one's tongue and/or pressing one's toes) can greatly affect the polygraph results. Raskin, 1986 Utah.L.Rev. at 50-52.

This Court has dealt with a similar problem in Bundy II - whether hypnotically refreshed testimony is reliable and should ever be admitted at trial. This Court reaffirmed the validity of the Frye standard, 471 So.2d at 18, and, more importantly,

recognized the ineffectiveness of "safeguards" to insure reliability. Id. Likewise, polygraphs are demonstrably unreliable, id., and a compromise approach will not alter that basic weakness. As the Illinois supreme court noted:

> [I]t is inconsistent for a court to affirm the unreliability of lie-detector tests and at the same time admit into evidence the results of a stipulated test. If such tests are as unpredictable and misleading as the courts are so certain they are, then their reliability and usefulness to the court and jury upon the ultimate question of guilt or innocence remains the same, regardless if they are admitted by stipulation or not.

People v. Zazetta, 189 N.E. 2d 260, 269 (Ill. 1963).

Moreover, another feature of polygraphs perverts criminal trials - their not-so-subtle prejudicial effect far outweighs its probative value. See §90.403, Fla.Stat. (1985). This problem stems from its purported ability to divine "the truth." For centuries, man has sought an easy and sure way of determining the truth - from the mythical lantern of Diogenes and the ancient oracle of Delphi to the modern jury trial. Though the quarry has been elusive, enthusiasm for the hunt is undiminished. It is this long sought (and never obtained) goal that the polygraph purports to attain. See United States v. Alexander, 526 F.2d 161, 169 (8th Cir. 1975) (polygraph evidence cuts to the very heart of the jury system - it bears on the sole issue reserved for the jury - is the defendant innocent or guilty?).

Besides seeking a lofty goal, the polygraph has another weighty credential to sway jurors - the guise of scientific infallibility. One cannot gainsay the established recognition that jurors are overawed by the presentation of "scientific"

evidence from a machine by experts. See C.A. Menard, "The Polygraph: A Critical Appraisal," 50 Fla.B.J. 147, 150 (March, 1976) (people accord "an almost religious authority" to the polygraph instrument). As in this case, this evidence typically comes in with all the scientific trappings: an extensive recitation of professional qualifications of the examiner, a discourse on the reliability of this (pseudo) forensic science, testimony regarding the meticulous calibration and maintenance of the machine, and presentation of the polygram, itself, to buttress the examiner's opinion (R303-18). These are impressive credentials for any jury to weigh. See, United States v. Alexander, 526 F.2d at 168.

Of course, the effect of such evidence in a forum that is institutionally designed to uncover "the truth" cannot be understated.[16] Indeed, this Court has repeatedly acknowledged this effect. From the warning in Kaminski to avoid "the substitution of a mechanical device ... for the time-tested, time-tried and time-honored discretion of the judgment of a jury as to matters of credibility," 63 So.2d at 341, to the reaffirmation in Delap, that such evidence is "too capable of misinterpretation to be admitted at trial," 440 So.2d at 1247, this Court has exhibited a consistent wariness of the effect of such evidence. This Court's view is best summed up in the oft-repeated phrase in Farmer that "the polygraph has attained an almost mythical aura." 427 So.2d at 191. Again, Florida is not alone in this judgment.

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[16] The Louisiana Supreme Court dramatically makes the point - it bars polygraph evidence because of this effect even though it views such evidence as "highly probative." State v. Catanese, 368 So.2d 975, 981 (La. 1979).

Akonom v. State, 394 A.2d at1219 n.8; State v. Frazier, 252 S.E. 2d at 47-8; State v. Dean, 307 N.W. 2d at 646; People v. Anderson, 637 P.2d at 361; State v. Grier, 300 S.E. 2d at 360; People v. Taylor, 462 N.E. 2d 478, 485 (Ill. 1985).

Thus, this Court must not promote "the admission of such weak, debatable evidence under the guise of science" because such evidence will only "perpetuate costly errors and social injustice." 9 Law and Psychology Rev. at 75. The citizens of Florida deserve more.

2. Practical Problems

Florida's experience with polygraphs is not "insubstantial." Farmer v. City of Fort Lauderdale, 427 So.2d at 189. That experience has been a tortured path past the many practical problems inherent in the minefield of stipulated polygraph evidence. Of course, Florida courts have tried to stem the tide of problems by strictly construing stipulations, see Moore v. State, 299 So.2d 119 (Fla. 3rd DCA 1974); State v. Cunningham, 324 So.2d 173 (Fla. 3rd DCA 1975); State v. Fuller, 387 So.2d 1040 (Fla. 3rd DCA 180); Brown v. State, 452 So.2d 122 (Fla. 1st DCA 1984); Anderson v. State, 11 FLW 2509 (Fla. 1st DCA 1986, opinion issued December 2, 1986), but that has not stopped both parties from arguing over: whether polygraph evidence is admissible on a motion for new trial, State v. Brown, 177 So.2d 532 (Fla. 2nd DCA 1965); to what limit a party can cross-examine the examiner, Moore v. State, supra; what constitutes a reference to the taking of a polygraph, Sullivan v. State, 303 So.2d 632 (Fla. 1974); Bollinger v. State, 402 So.2d 570 (Fla. 1st DCA 1981); whether a stipulation contemplates admissions concerning other

crimes, State v. Cunningham, supra; whether pre-test and post-test admissions are admissible, Hostzclaw v. State, 351 So.2d 970 (Fla. 1977); State v. Fuller, supra; whether a pre-prosecution stipulation waives objection to use at trial, Brown v. State, supra; and whether a stipulation to admissibility implicitly limits use to matters of credibility, Anderson v. State, supra. Even Judge Glickstein, an ardent advocate of the admissibility of stipulated polygraph evidence, recognizes the need for the parties to explicitly define the terms of the bargain in writing.[17] See Howard v. State, 458 So.2d 407 (Fla. 4th DCA 1984) and Judge Glickstein's dissent to the en banc opinion in this case, 11 FLW at 2240-41. Thus, it's safe to assume that Florida lawyers will continuously test stipulations at trial and likewise, appellate courts will spend needed judicial resources to resolve these recurring issues.

The experience of other states with these issues further illustrates the problems. The Wisconsin supreme court's well reasoned decision in State v. Dean, supra, is a primer on the practical problems of stipulations and polygraphs. The Dean court re-evaluated Wisconsin's prior rule of admission by stipulation, State v. Stanislawski, 216 N.W. 2d 8 (Wis. 1974), primarily because of criticisms of the effects of the Valdez approach mandated by Stanislawski. 307 N.W. 2d at 629. The Dean court identified a number of concerns that were not resolved by the Stanislawski approach: 1) despite the requirement of a stipulation, numerous cases attempted to seek admission of

[17] The stipulation here was oral and its contours in dispute at trial. (R305-06).

unstipulated polygraph results, Id. at 638-41; 2) the initial burden on the trial judge to determine the proper foundation for such evidence - ie. whether the expert witness is qualified, whether the defendant is a suitable subject, whether the methods used in conducting and interpreting the test are valid, or whether the evidence should be limited to certain types of cases - is substantial and ultimately not worth the cost. Id. at 650 citing United States v. Uriquidez, 356 F.Supp. 1363, 1367 (C.D.Cal. 1973); 3) the prospect of a battle of experts at trial has "little to support the consumption of judicial resources which such an inquiry would entail." Id. at 651; 4) there is a significant concern with the "uncertain impact" of such evidence on jurors, even with limiting instructions. Id. at 652-3; 5) there are serious questions with allowing the prosecutor a veto of evidence favorable to the defendant, Id. at 653; and 6) refinement of the Stanislawski conditions did not progress sufficiently in seven years of practice and was unlikely to develop in the future on other than a case-by-case basis. Id.

The Dean concerns are well founded and based on experience. This Court should take held and forestall any future problems in Florida by adopting a per se rule.

CONCLUSION

Polygraph evidence is inherently unreliable and prejudicial. Some courts try to cure these problems by compromising - they allow such evidence by stipulation and then, usually,on the fulfillment of certain conditions. However, all too often these conditions do little other than to make the theory more palatable - on the other hand, "they provide no safeguards to protect against the spectre of trial by polygraph." State v. Grier, 300 S.E. 2d at 360. It is that spectre that hangs over this case - will criminal trials continue to be decided by juries, or will that traditional judicial mechanism be discarded in favor of the "truth" machine? Petitioner submits the en banc Missouri supreme court has the answer to that question:

> We will not be a party to doing anything to displace the jury in its constitutional role of determining whether or not the accused is guilty. We have always relied on the jury, made up of individuals with diverse backgrounds, viewpoints and knowledge, by use of its common sense and collective wisdom and judgment, to determine who is telling the truth and what the facts are. There is no place in our jury system for a machine or an expert to tell the jury who is lying and who is not.

State v. Biddle, 599 S.W. 2d at 191. This Court should join this growing trend and adopt a per se rule. Petitioner's conviction must be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished, by courier, to Joy B. Shearer, Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401, this __th day of January, 1987.

Thomas J. Ball III

Of Counsel