IN THE SUPREME COURT OF FLORIDA

CHARLES SEATON DAVIS, Petitioner, vs. STATE OF FLORIDA, Respondent.	CASE NO. 69,677

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

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

STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of the Case and Facts as presented on page two (2) through four (4) of Respondent's Brief on the Merits.

ISSUE ON APPEAL

WHETHER A TRIAL COURT REVERSIBLY ERRS WHEN, UPON A PROFFER OF A PROPER JURY INSTRUCTION REGARDING THE RELIABILITY OF POLYGRAPH TEST EVIDENCE, THE COURT GIVES AN INSTRUCTION ON THE WEIGHT TO BE GIVEN TO EXPERT OPINION TESTIMONY?

SUMMARY OF THE ARGUMENT

The Respondent asserts that the Petitioner was properly convicted of theft and was not entitled to a specific jury instruction regarding polygraph tests. The parties stipulated to the admission of the results of the polygraph examination, thereby waiving objections to the test's reliability. The Respondent maintains that the polygraph is a reliable test and waiver of objections to its admission based on reliability does not render the polygraph unreliable. As the parties stipulated to the admissibility, they are estopped from claiming entitlement to a cautionary instruction.

The trial court instructed the jury as to the weight to be given to expert testimony and was not remiss in refusing to give the requested, argumentative instruction. A rule of per se reversal upon a trial court's refusal to give a requested proper jury instruction is harsh and judicially uneconomical as, if error is found, the harmless error doctrine is applicable.

The issue presented to this Court is not the issue upon which this case was determined. The proffered jury instruction in the case at bar was found to be argumentative and improper. Therefore, any finding of this Court contrary to Respondent's request for affirmation should be applied prospectively.

ARGUMENT

A TRIAL COURT DOES NOT REVERSIBLY ERR WHEN, UPON A PROFFER OF A PROPER JURY INSTRUCTION REGARDING THE RELIABILITY OF POLYGRAPH TEST EVIDENCE, THE COURT GIVES AN INSTRUCTION ON THE WEIGHT TO BE GIVEN TO EXPERT OPINION TESTIMONY.

In the case at bar several issues are presented beyond the pivotal issue of whether, upon stipulation, the parties may introduce into evidence the results of a polygraph test, and have the jury instructed as to the reliability of the test. The Petitioner seeks to preclude all evidence of this nature from entering the courtroom. (Petitioner's Brief at 17). The Respondent asserts that upon stipulation the results of a polygraph test should be admissible in a court of law and that a rule of per se reversal is unnecessary and overbroad. The stipulation, however, needs to be precisely drawn and executed by the parties involved. Howard v. State, 458 So.2d 407, 408 (Fla. 4th DCA 1984). As applied to the instant case, contrary to Petitioner's position, the Respondent maintains there is no entitlement to the proffered limiting jury instruction, that the jury instruction as to expert witnesses was inclusive as to the expert testimony regarding the polygraph. Further if any error occurred, it is deemed harmless given the expert opinion instruction and the fact that defense counsel had ample opportunity to cross examine the state's witness as to the reliability of polygraph tests and to argue the unreliability

thereof during closing argument. Additionally, the trial court was well within its province to avoid commenting on the evidence.

Florida has for a long time recognized the admissibility of lie detector tests upon stipulation. State v. Brown, 177 So.2d 532 (Fla. 2nd DCA 1965). The immediate question now before this Court is whether upon such stipulation the trial court reversibly errs should a properly phrased instruction be refused. Respondent urges this court to retain the current status as to the admissibility of polygraph test results: admission pursuant to stipulation.[1]

ENTITLEMENT TO A JURY INSTRUCTION

The Petitioner's first assignment of error is that he was entitled to a jury instruction which, with specificity, would address the reliability, or lack thereof, of polygraph tests. Relying on a number of reasons, the Respondent asserts that no error resulted from the trial court's refusal to give the Petitioner's proffered jury instruction. The Fourth District Court of Appeal partially addressed this issue on the rehearing of this case. The trial court is not obligated to furnish a proper jury instruction when an inappropriate instruction is

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[1]Further argument will be addended upon addressing Petitioner's efforts to have this Court abandon its rule of admissibility upon stipulation. Infra at 27. Respondent would point out that the issue before this Court is not the admissibilitiy of polygraph test results.

proffered by a party. Davis v. State, 11 F.L.W. 2238, 2240 (Fla. 4th DCA October 22, 1986), referencing Carron v. State, 427 So.2d 194 (Fla. 1983). However, it is first appropriate to question the propriety of any given instruction considering the stipulation pertinent to this case. The opinions in Delap v. State, 440 So.2d 1242 (Fla. 1983), Howard, supra and the dissent in Davis state viable arguments as to why it is not necessary, nor appropriate, for the court to specifically instruct the jury as to the reliability of the polygraph evidence; only instructions as to the Petitioner's theory of defense are appropriate.

When parties to an agreement waive objections to the admissibility of certain evidence, when that evidence is generally excluded due to questions of reliability, the parties to the stipulation are precluded from having the court instruct the jury as to the reliability of the admitted evidence.

> [T]he polygraph is not a sufficiently reliable or valid instrument to warrant its use in judicial proceedings unless both sides agree to its use and that even upon its introduction it is not conclusive, but is only one other piece of evidence entitled to whatever weight it is assigned by the fact finder.

Farmer v. City of Fort Lauderdale, 427 So.2d 187, 190 (Fla. 1980) (emphasis added). Two pertinent factors stand out: one, polygraph test results are generally not admitted without a stipulation waiving the issue of reliability and two, the evidence of such results is to be treated like any other bit of

evidence. Although Respondent maintains the high degree of reliability of polygraph tests, infra at 35, Petitioner's attempt to walk both sides of the track by bifurcating the evidentiary objection based on unreliability from the weight to be given to this evidence by the jury is a venture in duplicity that makes swiss cheese out of any stipulation.[2] As noted in Farmer, this evidence is to be treated as any other evidence--no special instructions.

The Petitioner references cases wherein it was found that the "stipulation is ... based on principles of consent and waiver and does not even purport to deal with ... questions respecting ... reliability ... . It simply cannot be ... argued that any foundation as to accuracy is achieved by stipulation." State v. Gries, 300 S.E. 2d 351, 359 (N.C. 1983). The defense reaches a conclusion, therefore, that an alleged waiver of reliability at one part of the trial does not preclude arguing otherwise at another phase of the trial. However, there is substantial authority that a court admitting stipulated to polygraph results is not waiving reliability, but rather "courts admitting polygraph evidence under stipulated controls apparently do so because of a 'tacit belief' in the accuracy of the

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[2]The logical solution is to, as the Fourth District Court of Appeal suggests in Howard, put the entire agreement, jury istructions and all, in writing. Here the parties did not put their understanding in writing and it would be inequitable to now have the proponent of the test exculpate himself by a "Catch 22".

technique when so utilized." Corbett v. Nevada, 584 P.2d 704, 706 (Nev. 1978). There is no reservation in a stipulation other than what is specifically set forth.

Unlike cases cited for the proposition that the trial court reversibly erred by refusing to give a jury instruction regarding a defendant's theory of defense, in the case at bar the Petitioner's "only defense in the trial court was [not] predicated upon the claim" of unreliability of polygraph evidence. Davis v. State, 254 So.2d 221, 222 (Fla. 2nd DCA 1971). The instant Petitioner's theory of defense was that someone else took the money -- he did not. The State called the expert witness who administered the polygraph test and an expert witness instruction was given, as well as the requested instruction on circumstantial evidence. "Experts also recognize that the reliability of a polygraph test depends primarily on the expertise of the examiner and upon his technique." United States v. Oliver, 525 F.2d 731, 737 (8th Cir. 1975). What the Petitioner requests is an additional instruction on innocence. Reviewing this Court's opinion in Palmes v. State, 397 So.2d 648 (Fla. 1981) crystallizes, or at least clarifies the issue as to entitlement to a jury instruction on the theory of his defense.[3] The Petitioner maintains his innocence (Petitioner's

[3]Palmes cites to cases wherein the judge erred in not instructing the jury on the defendant's theory of defense: alibi, coercion, entrapment, justifiable homocide and withdrawal. Palmes at 652.

Brief at 7 n. 2), he has no legal excuse; he alleges his boss and/or a bank teller committed the crime (R. 596, 597; Petitioner's Brief at 2). The polygraph test was interpreted by an expert witness and it is his testimony which the court instructed the jury on. Unlike the defendant in Koontz v. State, 204 So.2d 224 (Fla. 2nd DCA 1967) whose defense was coercion, the instant Petitioner had no corroboration as to his defense that others took the money; nor did he have a legal excuse for his crime; and unlike the judge in Koontz, the trial judge sub judice properly refused the limiting instruction. The fact that the Appellant stipulated to the admission of the results of a lie detector test does not change his theory of defense.

The Petitioner is heard to assert that the issue/defense is his credibility. His defense was innocence, and the fact that the expert witness gave his opinion as to Petitioner's deceptiveness on the lie detector test does not change the theory of defense.[4] As noted in Farmer, it is just another bit of evidence. An analogous situation arose in United State v. Phelps, 733 F.2d 1464 (11th Cir. 1984) wherein the Appellant sought a reversal based on the court's refusal to instruct the jury as to the legality of owning an escort service

[4]The reliability or unreliability of these tests comes not from the test itself, but rather from the interpretation given to those results by the examiner, and hence the expert witness instruction.

when the charge was transporting women interstate for immoral purposes. The Eleventh Circuit held:

> Because ownership of escort and dating services could form no basis for a theory of defense against the charges set forth in the indictment, the requested instruction was purely argumentative and a trial judge is under no obligation to give an argumentative instruction.

Id. at 1473. As noted, the defense theory of innocence to the theft of money has nothing to do with the reliability of a lie detector test beyond the opinion of the expert witness. Based on entitlement, the trial court was correct in refusing the proffered jury instruction on the reliability of the polygraph test results.

> [A]n appellate court in reviewing a jury charge need only ascertain whether the charge, when viewed as a whole, fairly and correctly, states the issues and law. . . .Reversible error does not occur as long as the charge on the whole accurately reflects the legal issues.

United States v. Russell, 717 F.2d 518, 521 (11th Cir, 1983), (citations omitted).

Petitioner's contention that he is entitled to a specific jury instruction is premised on the bifurcation of a stipulation to admissibility. As noted supra at 7,8, this interpretation is duplicious. In State v. Renfro, 622 P.2d 1295 (Wash. App. 1981) the court noted, as in Howard, that "[t]he stipulation, in effect, waives proof of the unreliability of the examination." Id. at 1300. The defendant in Renfro having been

charged with murder stipulated to the admissibility of the results of a to be given polygraph test. Having "failed" the examination the defendant assigned as error the court's failure to give the jury a limiting instruction even though he did not request one. As is evident in the case sub judice, the Court in Renfro also allowed the defense latitude in closing argument and cross examination.

> An evidentiary instruction on the use of a polygraph examination does not in our opinion rise to the necessary constitutional magnitude [minimum standards of due process], since the limitations of its usefulness may be highlighted by cross examination and by argument.

Id. at 1299. This decision was affirmed in State v. Renfro, 639 P.2d 737 (Wash. 1982), wherein the Washington Supreme Court is cognizant of the duplicity of the defendant's arguments:

> Defendant now claims that despite the stipulation the polygraph results should still be inadmissible because the stipulation does not make the test any more reliable.

Id. at 739. The Renfro court is astute in placing polygraph test results in their proper prospective:

> The issue, however, is not whether this evidence is by itself able to support a criminal conviction... . Rather, it is whether a polygraph test is reliable enough to be relevant. The test of relevancy is whether the evidence has a "'tendency to make the existence' of the fact to be proved 'more probable or less probable than it would be without the evidence.'"
> . . .

> Both parties, each from a different perspective, believed the result of the polygraph examination would be relevant to the case and by their stipulation waived any question as to the degree of the reliability of the polygraph.

Id.[5] Accord, United States v. Oliver, 525 F.2d 731, 737 n. 11 (8th Cir. 1975). Upheld was the proposition that the trial court need not provide the jury instruction and that the omission of a limiting instruction does not infringe upon the defendant's due process rights--thus no entitlement to a jury instruction.

DUPLICATION OF JURY INSTRUCTIONS

Again, in the case sub judice, the Petitioner has little basis upon which to assert error as the trial court did give the standard jury instruction pertaining to expert opinion testimony (R.635) and an instruction as to circumstantial evidence (R.634). The testimony of the polygraph operator was admitted as expert testimony:

> Like other witnesses, you may believe or disbelieve all or any part of an expert's testimony.

(R.635). In Johnson v. State, 484 So.2d 1347, 1350 (Fla. 4th DCA 1986) the Court noted that "[t]he refusal to give a requested charge when it is covered by charges given does not constitute

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[5]See Appendix as to recommended specifications for a proper stipulation to the admissibility of polygraph evidence.

error." Id. The reliability of polygraph test results, or the lack thereof, stems not from the test itself. The reliability stems from the test questions, the manner in which the test is given and the interpretation of the results by the expert. It is therefore the expert's testimony whose opinion is proffered to the jury which is the basis for a limiting instruction. As such it was not necessary to give the requested instruction, assuming it was proper, as the jury was told in what manner to consider the expert opinion testimony.

> [T]he trial court refused to give appellant's requested instruction, which is specialized and requires comment on the evidence. Instead, the trial court gave the standard jury instruction used in criminal cases. . . . This is the correct practice as the standard jury instructions were designed to cover all aspects and elements of the statutory offense, and to avoid unnecessary comment on the evidence.

Perkins v. State, 463 So.2d 481, 483 (Fla. 2nd DCA 1985) (citation omitted). Sub judice, the trial court's concern was that, aside from the impropriety of the proffered instruction, he would be commenting on the evidence had he instructed the jury as requested. (R. 569) "A trial judge should not convey to a jury any intimation as to the court's opinion of the case." Steward v. State, 420 So.2d 862 (Fla. 1982). Counsel for each party were permitted to argue the reliability or lack thereof during closing arguments as well as questions propounded during direct and cross

examination. Had the judge commented on the reliability of polygraph test results it would have been a comment on the evidence. This court approved of Jackson v. State, 435 So.2d 984 (Fla. 4th DCA 1983), see Whitfield v. State, 452 So.2d 548 (Fla. 1984). In Jackson, the court questioned the propriety of permitting the trial judge to give an instruction on a defendant's flight as evidence of guilt, while finding additionally, that an instruction on a change in a defendant's appearance as evidence of guilt is improper. In as much as this Court holds, "[e]specially in a criminal prosecution, the trial court should take great care not to intimate to the jury the court's opinion as to weight, character, or credibility of any evidence adduced[,]" Id. the Fourth District Court of Appeal's pronouncement is appropppriate sub judice.

> We have abundant confidence that a jury will be able to weigh such facts appropriately as augmented by argument of counsel. There is no necessity for the court to add the great influence of a jury charge on the effect of such actions.

Jackson at 985.

> The interviews that we had with the Jurors in the Grasso case would seem to refute the often heard comment that the polygrph will replace the Jury or usurp the Jury's functions, or somehow be so prejudicial in its weight and impact that the Jury will disregard all other evidence and go on the polygraph test results alone. Here we have direct proof that, at least in one case, not only did the polyraph test results not usurp the Jury's function but they were able to

handle it in much the same manner they did all other eivdence in the case.

Tarlow at 969[6] (emphasis supplied), quoting Barnett, How Does a Jury Veiw Polygraph Results? 2:4 Polygraph 275 (1972).

Given the foregoing substantiation of the trial court's reasonable declination to give the proffered jury instruction, the Fourth District Court of Appeal's recognition that the trial court is not required to fashion a proper instruction, the non-entitlement to a special instruction and even so, the coverage of the subject matter in the expert opinion instruction, Respondent respectfully requests this court to affirm the trial court. Respondent requests that the affirmation of Petitioner's conviction be affirmed on the basis of Delap v. State, 440 So.2d 1242 (Fla. 1983) wherein this Court holds that "[t]he use of a polygraph examination as evidence is premised on the waiver by both parties of evidentiary objections as to lack of scientific reliability." Id. at 1247, and on the basis of Howard v. State, 458 So.2d 407 (Fla. 4th DCA 1984), wherein the stipulation moots the issue of reliability. Further, to hold that if any error occurred, that it is harmless error.

Respondent contends that Petitioner's alleged right to a jury instruction on the reliability of the polygraph test has been met in that the trial court gave the standard jury

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[6]Tarlow, Admissiblity of Polygraph Evidence in 1975: An Aid in Determining Credibility In a Perjury-Plagued System, 26 Hastings L. J. 917, 956 (1975).

instruction as to the weight to be given to the opinion testimony of an expert witness. A District Court of Appeal in California takes the same position. In People v. Reeder, 65 Cal.App. 3d 235, 135 Cal.Rptr. 421 (3rd DCA 1976) the court held that it was error not to give the standard jury instruction on the "weight and effect of expert testimony." Id. at 241. The defendant had unsuccessfully asserted "that the trial court was required to instruct that the polygraph evidence was not to be considered upon the elements of the charged offenses, but only as it tended to prove or disprove the veracity of the subject at the time of the test." Id. The court held that the expert opinion instruction "must be given sua sponte where expert testimony has been received." Id. Sub judice, the trial court instructed the jury regarding the weight to be given to expert opinion testimony. (R. 635).

In Poole v. Perini 659 F.2d 730 (6th Cir. 1981) the court did not find error in the trial court's admitting polygraph evidence pursuant to a written stipulation even though the defendant argued constitutional error, the alleged error being that the trial court did not give a requested cautionary instruction. Rather, the instruction, as in the case at bar, was "that they should determine the weight of the testimony of the operator of the lie detector apparatus." Id. at 735. The Court noted that there may have been some error in the given

instruction, but if so it did not deprive the defendant of a fair trial.

HARMLESS ERROR

If in fact the trial court did err in not instructing the jury on the reliability of polygraph test results by not having defense counsel redraft the proposed instructions, then such error was harmless. Respondent submits that harmful error should adhere "only when the error committed was so prejudicial as to vitiate the entire trial." Cobb v. State, 376 So.2d 230, 232 (Fla. 1979); accord State v. Murray, 443 So.2d 955 (Fla. 1984). Given the totality of the record and the evidence admitted, the jury instruction as to expert testimony and circumstantial evidence, it cannot be said that the failure to give the requested instruction was harmful error. "The question is whether there is a reasonable possibility that the evidence [or lack thereof] complained of might have contributed to the conviction." Chapman v. California, 386 U.S. 18, 23 (1967). In the instant case the Petitioner testified at trial. Had the jury believed his "in person" denial of guilt his acquittal would have been forthcoming. The evidence pointing to the Petitioner's guilt is overwhelming, warranting a confirmation of his conviction regardless of whether this Court finds error in the trial court's refusal to charge the jury as requested. The evidence demonstrated that the Petitioner was responsible for

depositing the money with the bank. That on fourteen different occasions the money was not received by the bank as evidenced by the lack of a deposit stamp on the deposit slips. Although the Petitioner points a finger at the bank tellers and/or his boss, no further substantiation or exculpatory evidence was furnished when the Petitioner testified at trial. The evidence against the Petitioner is so overwhelming that if any error occurred by the omission of a particular jury instruction, that such omission did not prejudice the Petitioner. The requested jury instruction would not have enlightened the jury above and beyond the evidence and instruction already before them. Infra at 20-22. Further evidence of harmless error is the decision in Moore v. State, 299 So.2d 119 (Fla. 3rd DCA 1974) wherein the court affirmed the trial court's admission of a polygraph examination over defense objection that no cautionary jury instruction was given. Defense counsel did not object nor request a special instruction, but nonetheless there was no reversal.

The Supreme Court of Arizona found that failure to give a cautionary instruction regarding polygraph evidence is subject to the harmless error rule. State v. Trotter, 514 P.2d 1249 (Ariz. 1973). Arizona requires certain prerequisites to the admission of polygraph evidence pursuant to a stipulation. One of the requirements is that the judge instruct the jury that, at most, the defendant was not being truthful at the time of the polygraph examination. Id. at 1252.

> While we must agree with counsel for the defendant that the court's failure to give such an instruction sua sponte constituted error, we do not feel that it requires a reversal under the facts of the instant case.

Id. The court noted that the state had "introduced sufficient evidence so that the jury could have convicted the defendant without the testimony concerning the polygraph examination." Id. In the case at bar there is sufficient evidence, notwithstanding the fact that the evidence is circumstantial, so that any evidentiary conflicts were resolved by the jury. Sub judice the defense elicited the following negatives upon cross examination of the polygraph expert:

a. the machines are callibrated weekly, but other examiners use this expert's machine (R. 321)

b. "that the polygraph machines and results are so unreliable that they are not normally admitted into a court of law unless they are stipulated to []" (R. 321)

c. that the machine measures adrenal response (R. 321), and adrenal responses are caused by fear of being caught (R. 321) and perhaps to other stimulation (R. 322)

d. that this polygraph examiner is not a doctor (R. 322)

e. "that a question or an answer to a question could appear to be truthful if the question is asked one way and to be untruthful if asked in a different way []" (R. 323)

f. "that a polygraph is only as good as its operator []" (R. 323)

g. that "[o]utside fears do have some effect on the test[]" (R. 324, 326).

h. "a polygraph test is just ... opinion[]" (R.324).

i. that different examiners may evoke different responses and hence different results (R. 324, 325).

The defense counsel propounded the following negatives during her closing arguments:

> MS. KORTHALS: He tried to take a polygraph to prove his innocence to you. Now, the polygraphs are unreliabe. You've heard testimony that polygraphs are not entered or allowable in a court of law unless they're stipulated to; and, ladies and gentlemen, you stipulate to them before they're taken.
>
> Look at the polygraph. Look at what Detective Rios said, himself, on the stand.
>
> He said, "It's only an opinion." He said, "The polygraph results are only as good as the operator."
>
> He said, "Two different ways of asking a question can get two different responses. Whether you go over them ahead of time or not doesn't clear up every area of fear or every area of misunderstanding." He said that outside fears can influence this.
>
> Now, they can be, according to him, the outside fear of a bigger crime.
>
> How about the outside fear of an innocent man who is not believed?
>
> How about the outside fear of an innocent man going to jail for five years?
>
> How about the outside fear that you know you haven't done anything wrong, and you've been arrested, and you've been put in jail, and you've been brought before judges?

I think those outside fears just might have some influence on him.

He said, "It measures fear, not deception." I recall him saying that. Mr. Raticoff doesn't. You all rely on your own recollections.

Mr. Rios told you, himself, that it has happened in the past that a completely innocent person has appeared deceptive on these tests. It happened in the past. It could very easily happen again.

He told you he, himself, had a case where, when he gave the test, the person, knowing he was a policeman, was found to be deceptive. When another guy gave the same test on the same machine but it wasn't known that he was a policeman, the guy came out as honest as anything.

How reliable can this be if that happens?

It isn't reliable. It just is not reliable. It's a machine. It relies on an operator, and it works on psychological principles that can't be measured effectively.

It has many different things that can influence. It works on psychological theories that you can't clearly cut and say, "Here's where we draw the line. Here's the truth, and this is a lie."

Even Detective Rios told you that was a misnomer. Many, many factors can influence the polygraph test: the skill of the operator, the emotional state of the person tested, the fallibility of the machine, itself. I believe surprise, pain, shame, embarrassment, all types of idiosyncratic responses will make that machine jump.

In any event, the results you heard are only one piece of evidence and, I submit to you, ladies and gentlemen, are not a very reliable piece of evidence. I would ask you all not to let this mechanical device

> substitute for the time-tested, time-tried and time-honored discretion and job of the jury to make up your own minds about who is telling the truth and who is not in your search for truth, reasonable doubt or justice.

(R. 604-06). Additionally, as noted, the court in Poole v. Perini, 659 F.2d 730 (6th Cir. 1981) found harmless error where the trial court instructed the jury only "that they should determine the weight of the testimony of the operator of the lie detector apparatus." Id. at 735.

This Court, at present, requires no more than a stipulation between the parties prior to admission of polygraph evidence. Codie v. State, 313 So.2d 754 (Fla. 1975). However, if error is founded in the trial court's actions, then such error should be deemed harmless. The same information in the proposed jury instruction was put before the jury by defense counsel. "These instructions are not crucial to constitutional due process which is insured by [other means]." State v. Renfro, 639 P.2d 737, 740 (Wash. 1982).

PROSPECTIVE APPLICATION

Respondent recognizes this Court's task in balancing the equities of this case. Accordingly, it is requested that should this Court determine that a jury instruction is required when parties stipulate to the admission of polygraph test results that the holding be applied prospectively.

> [The] unforeseen change in the law and the burden that retrospective application would place on the administration of justice and the need for finality in

> criminal cases support a holding of prospective application only.

Bundy v. State, 471 So.2d 9, 18 (Fla. 1985). As in Bundy, the case sub judice involves the admissibility of scientific evidence, and hence, the same judicial concerns regarding a retrospective application of a holding excluding such evidence or requiring additional criteria to its admissibility. The purpose served by requiring a jury instruction as to the reliability of polygraph test results is to instruct the jury as to the weight the expert testimony is to receive, as these tests (if found by this Court) are alleged to be unreliable. As in Bundy, "this purpose [does not] warrant[ ] the reexamination of unknown numbers of jury verdicts." Id. Further "the apparent reliance of the police on the use of [polygraphs] also clearly weighs in favor of the prospective application of [any] ruling." Id.

> The third criterion to be considered is the effect of retroactive application on the administration of justice. There are obvious practical considerations, in addition to the taxing of trial and appellate courts, in denying retroactive application of [any] ruling. Only where there is a denial of a basic right of constitutional magnitude that is correctable will retroactive application be applied. This is not the case here.

Id. The reexamination of Respondent's argument regarding harmless error as to the trial court's ruling should satisfy this Court that evidence against the petitioner was sufficient so that, beyond a reasonable doubt, the omission of a specifically requested jury instruction, albeit an argumentative instruction,

was not the grounds upon which a conviction was based. Had the instruction been forthcoming, this Court should note, nothing additional would have been put before the jury than what was already proffered to them by way of defense counsel's closing argument and her cross examiantion of the expert in conjunction with the standard expert opinion instruction.

Oklahoma recognizes "a general rule of law that decisions of the highest court overruling a prior decision are prospective in application unless specifically declared to have retroactive effect." Walton v. State, 565 P.2d 716, 718 (Okl. Cr. 1977). Application of the court's prior finding of total inadmissibiliity of polygraph evidence was applied prospectively as the law in effect at the time of Walton's trial allowed admission of polygraph evidence upon stipulation. Consequently that court upheld the defendant's conviction. Accord, State v. Griffin, 621 S.W. 2d 113 (Mo. App. 1981).

As recited the Respondent requests this Court to apply any change in the current status of admissibility of polygraph evidence prospectively. However, this Respondent maintains the validity of using polygraph evidence, especially upon the stipulation by both parties.

Respondent asserts that this Court should, at the very least, maintain the status quo: requiring a stipulation to the admissibility of polygraph test results. The issue presented is not the viability of this rule, but rather, should this Court

promulgate a rule of per se reversal when a proffered, proper jury instruction is refused? The Respondent maintains it is not necessary to give a specific jury instruction as to polygraph evidence, and alternatively maintains that application of the harmless error rule is appropriate to possible omissions. Assuming arguendo that this Court finds that a party who stipulates to the admissibility of polygraph test results (and this stipulation fails to cover jury instructions) is entitled to a specific jury instruction, the Respondent cautions that an omission may not be prejudicial nor harmful and therefore, to require per se reversal is judicially uneconomical.

To the pessimist/opponent, the polygraph is a half empty glass of water, to the optimist/proponent, the polygraph is a glass of water half filled; however, in order to fully appreciate the benefits inherent in the use of polygraphs, it is incumbent on those affected to analyze the dichotomy rather as relevant, expert evidence.[7] Given the current status in Florida of admissibility upon stipulation,[8] Petitioner's request that this Court totally exclude polygraph test results is the instant consideration. The current status of admissibility within the United States is in flux; not only as to the black and white issue of admissibility or the gray area of admissibility by

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[7]The glass of water analogy is used in the current advertising campaign of Shearson/American Express.

[8]Codie v. State, 313 So.2d 754 (Fla. 1975).

stipulation, but also as to different theories of admission.[9]

Revelance

The opposite of Petitioner's quest for exclusion is set forth in State v. Dorsey, 539 P.2d 204 (N.M. 1975) wherein the Supreme Court of New Mexico overruled its requirement for stipulation prior to admission of polygraph test results. The opinion, for the most part, based its new rule of admissibility on the New Mexico Rules of Evidence, which track the federal rules.[10] The rules used to support the relevancy theory are:

> Rule 402: All relevant evidence is admissible, except as otherwise provided by constitution, by statute, by these rules, or by other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible.
> Rule 401: "Revelant Evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.[11]

As in the case at bar, "[t]he polygraph evidence related to the defendant's credibility clearly a fact that is 'of consequence to the determination of the action,'"[12] and "evidence has [a]

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[9]Opinion testimony, Relevance, General Acceptance or acceptance within a particular field.

[10]Romero, The Admissibility of Scientific Evidence Under the New Mexico and Federal Rules of Evidence, 6 N.M.L.Rev. 187, 188 (1976)

[11]Romero at 200. It is noted that these rules are similar to Florida Rules of Evidence 90.401 and 90.402.

[12]Id. at 201.

tendency to make the existence of any fact ... more probable or less probable than it would be without the evidence."[13] Accordingly, the evidence becomes relevant and it is therefore admissible. The further question as to reliability of the relevant evidence will be discussed infra.

Other courts have used relevancy as a means of admitting polygraph test results. State v. Renfro, 639 P.2d 737, 739 (Wash. 1982) and United States v. Oliver, 525 F.2d 731 (8th Cir. 1975). Additionally, "Professor McCormick agrees that the standard for acceptance of polygraphic evidence should not differ from that of other evidence."[14] Of course, the probative value of the relevant evidence must be viewed to exclusion if there is overwhelming prejudice. The expert opinion instruction, as well as counsel's argument eliminated any possibility of prejudice sub judice.

Expert Opinion

Another basis upon which courts permit admission of polygraph evidence is that it is regarded as expert opinion testimony. "Although polygraph testimony is sometimes referred to as experimental and scientific evidence ... the evidence in reality is opinion evidence." United States v. Ridling, 350

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[13] Id.

[14] Wilner, Polygraphy: Short Circuit to Truth?, 29 U.Fla.L.Rev. 286, 295 (1977)

F.Supp. 90, 93 (E.D. Mich. 1972).

> The polygraph recordings must be interpreted. Only a person skilled in this art and science is qualified to interpret the results and that interpretation is stated in the form of an opinion.

Id. It was therefore correct for the trial court in the instant case to instruct the jury as to the weight to be given to expert opinion testimony. Mr. Rios was accepted by the court as an expert in polygraphy. (R. 305). He has administered over three thousand examinations. (R. 304). He has been licensed by the State of Florida since 1979, he is a member of the American Polygraph Association, the Florida Polygraph Association and the Sheriff's Association; he has written a manual on interrogation and interview; and he teaches at the American Institute of Polygraph and the Zonn Institute of Polygraph. (R. 304). Mr. Rios had four or five hundred hours of schooling. He interned for one year. (R. 309A). Mr. Rios explained the details of the test administration (R. 308) and admitted on direct examination that its results are not as reliable as are the results of fingerprint or ballistic tests. (R.307a) It was Mr. Rio's opinion that the Petitioner answered questions deceptively. (R. 310a, 318).

> The testimony of an expert polygraph examiner consists of his opinion as to whether the subject of the examination was telling the truth or something less than the whole truth when answering the test questions.

. . .

> The guidelines for admitting an expert's opinion are clear: 'A witness who by education and experience has become an expert in an art, science or profession may state his opinion as to a matter in which he is versed and which is material to the case, and he may also state his reasons for such opinion.'[15]

GENERAL ACCEPTANCE v. PARTICULAR FIELD

The pivotal case cited by most courts which reject polygraph evidence is Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). However, given the fifty-four years since its pronouncement and the basis for said pronouncement, this case presents yet another reason for the admission of polygraph evidence. As noted by Mr. Tarlow in his oft cited law review article, the Frye decision established the "rigorous 'general acceptance' standard" for polygraph testimony. Tarlow at 938. Mr. Tarlow negatives the impact of Frye by noting that the excluded test was not the present day multi-systemic measurement, but was rather the systolic blood pressure test. "Therefore Frye merely held that a specific device, the systolic blood pressure test, was not yet admissible." Tarlow at 940. Accord, United States v. DeBetham, 348 F. Supp. 1377 (S.D. Cal. 1972).

Further Mr. Tarlow recognizes that polygraph evidence has been held to a higher standard than other scientific

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[15]Tarlow, Admissibility of Polygraph Evidence in 1975: An Aid in Determining credibility In a Perjury-Plagued System, 26 Hastings L.J. 917, 935 (1975)

evidence,[16] and would proffer that acceptance be within a 'particular field' as opposed to general acceptance.[17]

> [T]he proper inquiry is not whether polygraphy ... has gained acceptance among physiologists and psychologists, as suggested in Frye; rather, it is whether there is general acceptance of the technique by experts in polygraphy. Considering the restrictive definitions applied to other fields, and the requisite level of 'general acceptance,' the expert polygrapher certainly has cause for wonder. If the issue involves sodium pentothal the answer may be supplied by an expert narco-analyst. Paternity blood testing is a particular field. One toxicologist can establish acceptance for his idea. If four physicists develop a specialty, they attain general acceptance in their own field.[18]

Respondent urges this Court to determine, upon a particular court's finding of admissibility of an expert polygraph witness, that polygraph test results be admissible if they are relevant and probative. However, in recognition of the status quo, admissibility upon stipulation, Respondent urges this Court to decline to place its imprimatur on a per se reversal rule should a trial court refuse to charge the jury as to a specific improper or proper jury instruction. This Court should accept Respondent's position that an instruction as to "expert

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[16]Tarlow at 938, 939 n. 107.

[17]Id. at 942.

[18]Id. at 942-43.

opinion testimony" is sufficient to guard against improper weight being given to such testimony, or as the parties stipulate to.

Admissible upon Stipulation

Prior to Respondent's discussion of reliability, it is necessary to note that this state applies the admission by stipulation standard. State v. Brown, 177 So.2d 532 (Fla. 2nd DCA 1965). This standard, in Florida, is such that a written stipulation is not required. Codie v. State, 313 So.2d 754 (Fla. 1975). Respondent would however urge this Court to set standards for stipulations. As asserted by the Appellant in Anderson v. State, 11 F.L.W. 2509 (Fla. 1st DCA December 2, 1986), the Petitioner in the instant case argues the stipulation meant one thing and the Respondent argues otherwise. Although in Anderson there was a written stipulation, the appellant attempted to limit its scope to credibilitiy where such was not delineated in the agreement. Litigants should know it is their terms in the stipulation that are the basis for admissibility and accordingly, should be pressed to determine the scope of the stipulation before the evidentiary ramifications are charted. Respondent urges the maintenance of the status quo not solely due to questions of reliabilitiy, but additionally, to ensure the voluntariness of the parties' submission to a polygraph examination.[19]

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[19]A polygraph examination cannot technically be administered to a party involuntarily.

In 1962 the Supreme Court of Arizona issued an opinion that sets the standard for courts deciding that polygraph evidence may be admitted upon the stipulation of both parties. In State v. Valdez, 371 P.2d 894 (Ariz. 1962) the court admitted the results of a stipulated to polygraph examination over the defendant's objections. Valdez provides criteria upon which to base a stipulation.[20] In reviewing the history of admission by stipulation, the Court in Valdez notes that the "[d]etermination of the value and weight of such evidence was left to the jury." Id. at 899 (citing People v. Houser, 85 Cal.App. 2d 686, 193 P.2d 937 (1948). Further, in the jurisdictions permitting admission by stipulation, the grieved parties were precluded from objecting to the admission of test results. Id., See also State v. McNamara, 104 N.W. 2d 568 (1960) and cases cited in Valdez. In State v. Rebeterano 681 P.2d 1265 (Utah 1984) the court, over the defenant's objection, permitted into evidence the stipulated to polygraph results. Having determined that the circumstantial evidence was sufficient for upholding the conviction, the Court found that its stipulation criteria had been met.[21] In 1977 the court in People v. Trujillo, 67 Cal.App. 3d 547, 136 Cal.Rptr. 672 (1977) admitted into evidence the results of a polygraph examination pursuant to a written stipulation. The defendant,

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[20]Appendix.

[21]Appendix.

who had signed the agreement, attempted to preclude admission as his new attorney was not a party to the stipulation and was opposed to it.

> This rule [admission by stipulation] has been applied in criminal cases on the theory that it would not be fair to permit a defendant who has entered such a stipulation to oppose the introduction of polygraph results when they turn out to be adverse to him.

Id. at 676. The Court found a trial judge may exercise discretion as to granting a motion by either party to exclude polygraph evidence.

> [T]o deny effect to such a stipulation would deprive both the court system and litigants of the opportunity to utilize a recognized scientific device, even though those involved believe its use can be fairly controlled and will aid in the administration of justice. A decision so rigid would ... be entirely inconsistent with the truth-discovery process.

Corbett v. State, 584 P.2d 704, 706 (Nev. 1978). The Corbett court found the parties had complied with the criteria set forth in Valdez and that there exists an "indirect assurance of accuracy" when the parties stipulate to the test. Id.

The parties in the instant case agreed to admit the results of the polygraph examination. It should be recognized that although the Petitioner attempts to limit "results" to pass or fail, secondary authority considers the "term 'results' [to include] the testimony of the examiner, and his deposition or affidavit, as well as the graphs or charts produced by the lie

dector." Annot., 53 ALR 3d 1005, 1006 n. 2. The trial judge properly admitted the test results and properly instructed the jury as to expert testimony. If, in deciding whether a court commits reversal error in refusing a proper jury instruction, this Court does find reversible error, Respondent urges this Court to recognize that the proffered instruction in the instant case was improper. Davis v. State, 11 F.L.W. 2238 (Fla. 4th DCA October 22, 1986).

Since the Frye decision in 1923 there have been many changes in the polygraph. The nature of the systemic measurements were singular in 1923, where now the polygraph has four or five different measurements. Tarlow at 940. In a "blind" test, wherein polygraph examiners were given the completed charts of persons who had submitted to testing, there was an 87.75% accuracy rate.[22] Diferent studies have produced different results depending on the controls used. Some accuracy figure reports are 90.9%, 92%, 92.4%, 91%.[23]

> In addition to experiments indicating the reliability and validity of polygraphy, and the extreme difficulty of 'beating' the test under a variety of circumstnaces, studies have confirmed the underlying theory of polygraphy: the

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[22]Horvath & Ried, The Reliability of Polygraph Examiner Diagnosis of Truth and Deception, 62 J. Crim L. C. & P. S. 276 (1971).

[23]Tarlow at 931-34.

> relationship of measureable physiological responses to the psychological process of deception. Experiments have revealed higher levels of detection where the subject is questioned about matters which have personal significance ... and where the subject has a high motivation to avoid detection.[24]

Two of the foremost authorities, J. Reid and F. Inbau, on polygraphy were against their use in court. However, in their 1966 book Truth and Deception the two reached the conclusion that polygraphs were "95% accurate with less than 1 percent error, 5 percent of the subjects not being capable of diagnosis because of psychological and physiological handicaps," thus finding that the results were sufficiently accurate to warrant admissibility. Tarlow at 928.

Although an Appellate Court upheld a trial court's use of discretion in excluding polygraph testimony the court notes:

> In support of his contention, appellant directs our attention to volume after volume of testimony, produced at the preliminary hearing, pointing to the reliability of this type evidence. During the four day hearing, the appellant called a substantial number of experts qualified in the field of polygraphy and in the related fields of psychology, psychiatry and physiology. Simply stated, the evidence at the hearing vigorously supports the accuracy of polygraphic evidence.

United States v. DeBetham, 470 F.2d 1367, 1368 (9th Cir. 1973) (emphasis added). Accord United States v. Ridling, 350 F.Supp. 90 (E.D. Mich. 1973).

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[24] Tarlow at 934, (footnotes omitted).

> We conclude that polygraph testing has been developed to such a point of reliability that in a criminal case when the State and defendant enter into a stipulation to have defendant submit to a polygraph test, and have the results introduced into evidence, such stipulation should be given effect.

State v. McDavitt, 297 A.2d 849, 854-55 (N.J. 1972).

The American Polygraph Association in its soon to be released 11th Edition of Quick Reference Guide to Polygraph Admissibility, Licensing Law, and Limiting Law (1987) indicates the current status of admissibility of polygraph evidence. To date:

1. The United States Supreme Court has not addressed the issue of admissibility;

2. The Federal Courts generally admit polygraph evidence at the discretion of the trial judge;

3. 18 states admit stipulated to test results;[25]

4. 25 states do not admit stipulated test results;[26]

5. 4 states have not made positive appellate decisions;[27]

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[25]Alabama, Arizona, Arkansas, California, Delaware, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Massachusetts, Nevada, New Jersey, Ohio, Utah, Washington and Wyoming.

[26]Colorado, Connecticut, Hawaii, Illinois, Louisiana, Maine Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, Ohlahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, West Virginia and Wisconsin.

[27]Alaska, Rhode Island, Vermont and Virginia.

6. 2 states admit polygraph evidence over objection;[28]

7. 1 state allows judge's discretion.[29]

There is not a vast majority of states which do not admit polygraph evidence, contrary to Petitioner's allegations.

Lastly, Petitioner argues six practical problems to the admissiblity of polygraph evidence. (Petitioner's Brief at 27, 28). The six alleged practical problems are illusory. 1.) The fact that some parties seek admission of test results without a stipulation should present no problem where a court has set rules. Either the court permits admission without a stipulation or permits admission only with a stipulation; 2.) The time burden on the trial judge regarding the determination as to whether a proper foundation has been laid depends on the court.

> In any jurisdiction where the reliabilitiy of the polygraph is judicially noticed (as, where admissibilitiy has been permitted by an appellate court), all that is required in any particular case is the qualification and testimony of the expert examiner.

Tarlow at 958 (footnote omitted). Petitioner states that there is "a significant problem with the qualifications of the marjority of examiners." (Petitioner's Brief at 20). However, more and more states have licensing requirements for their

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[28]Idaho and New Mexico.

[29]New York.

examiners. Currently thirty states, including Florida, have licensing and certification requirements. 1987 Quick Reference Guide To Polygraph Admissibility, Licensing Laws, and Limiting Laws, American Polygraph Association.

> A plausible rationale for admission by stipulation is that a stipulation at least expresses agreement of the parties to the competency of the examiner. Since the abilitiy of the examiner is the single most important variable affecting the accuracy of polygraph test results, such a stipulation is an indirect assurance of accuracy.

Tarlow, Admissibility of Polygraph Evidence in 1975: An Aid in Determining Credibility In a Perjury-Plagued System, 26 Hastings L. J. 917, 956 (1975).

The Petitioner's concern over other factors playing interference with valid test results are manifestly negated by the precautions taken in the test taking procedure.

> According to one study, attempts to deceive the polygraph, even by those who are guilty occur less than 20% percent of the time and are easily detected. Moreover, an experienced examiner has available procedures to counter every one of the attempts to 'beat' the test.

Tarlow at 963 (citaitons omitted). (See note 228 Tarlow at 963 for further discredition of Petitioner's theory).

3.) Upon stipulation the parties essentially eliminate any "battle of experts"; 4.) The impact on jurors is not prejudical, supra at 15, and jury instructions as to expert testimony ensures fairness; 5.) Upon stipulation the prosecutor

would not be able to veto evidence; and 6.) the foregoing arguments of Respondent, especially as to developments in the polygraph technnique since Frye, negative concerns over reliability of test results. The standardization of licensing, schooling and technique are relevant to the use of polygraphs in court.

CONCLUSION

Based on the foregoing reasons and citations of authority, the Respondent respectfully submits that the judgment and sentence of the lower court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondents Brief on the Merits has been furnished by courier to, THOMAS F. BALL, III, ESQUIRE, Assistant Public Defender, The Governmental Center, 9th Floor, 301 North Olive Avenue, West Palm Beach, Florida, 33401, this 5th day of March, 1987.

OF COUNSEL