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Criminal Law - Admissibility of Polygraph Data When Both Parties Have Stipulated That It Will Be Admissible - Cullin v. State

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CRIMINAL LAW—Admissibility of Polygraph Data When Both Parties Have Stipulated That It Will Be Admissible. Cullin v. State, 565 P.2d 445 (Wyo. 1977).

Defendant admitted fatally shooting her common law husband, but claimed self-defense. Two days after the shooting, defendant, represented by counsel, agreed to take a polygraph test. Under the agreement the prosecutor stipulated that if the test results favored defendant, she, would be prosecuted for manslaughter rather than murder and that she could use the test results in her defense. In exchange, defendant stipulated that if the results of the test suggested that her claim of self-defense was a lie, that evidence would be admissible against defendant and, inferentially, defendant would be prosecuted for first degree murder. Defendant reserved the right to attack the credibility of unfavorable results.

The Powell Police Chief thereupon administered a polygraph test to defendant and concluded that her claim of self-defense was not true. Over defendant's objection, that evidence was presented at trial. At trial defendant attacked the credibility of the Police Chief's interpretation of the polygraph results. Defendant was convicted of second degree murder.

Defendant appealed her conviction to the Wyoming Supreme Court, claiming, *inter alia*, that admission of the polygraph data constituted prejudicial error. The Wyoming Supreme Court stated that polygraph data is admissible by stipulation, providing that an adequate foundation is laid at trial and providing that the polygraph examiner is available at trial for cross-examination. In holding that an adequate foundation was laid in the *Cullin* trial the Supreme Court noted that defendant's own polygraph expert, as well as the two prosecution polygraph experts, testified to the high accuracy of the polygraph exam when properly conducted. The court concluded that the "defendant's attorney conducted an adroit, skilled, searching cross-examination of the witness, bringing out to an even greater extent the more than acceptable qualification of the polygraph examiner."[1]

1. Cullin v. State, 565 P.2d 445, 459 (Wyo. 1977).

In the *Cullin* trial the defense did not request and the court did not give a jury instruction to the effect that the polygraph examiner's testimony does not tend to prove or disprove any element of the crime with which a defendant is charged, but at most tends only to indicate whether or not the defendant was telling the truth at the time of the examination. On appeal Cullin urged that the failure of the trial judge to give such instruction *sua sponte* was reversible error. The Wyoming Supreme Court disagreed and stated that the trial judge should not be forced to assume the burden of defense.[2]

The *Cullin* court reserved opinion as to whether polygraph data would be admitted without a stipulation.

In a concurring opinion Mr. Justice Rose characterized the majority as holding that polygraph tests—assuming that proper foundation is laid—are admissible evidence, the reserved question apparently notwithstanding. Quoting from a law journal he asked, "By what logic should stipulated polygraph evidence be admissible when the same evidence without stipulation is barred?"[3]

This case note contains brief discussions of the polygraph and of the admissibility of polygraph results in criminal trials in other jurisdictions, as well as an analysis of the implications of the *Cullin* decision.

THE POLYGRAPH

The modern polygraph simultaneously measures the following physiological responses: breathing pattern, blood pressure and pulse and skin resistance to external current.[4] It may also contain sensors to detect muscle movements made by the subject which could influence the respiration and blood pressure and pulse responses.[5] Tension produced by lying is thought to be evidenced by changes in these responses just as

2. *Id.* at 455. In his concurring opinion, Mr. Justice Rose interpreted the majority as holding that in the future such an instruction should be given. *Id.* at 460.
3. Tarlow, *Admissibility of Polygraph Evidence in 1975: An Aid in Determining Credibility in a Perjury-Plagued System*, 26 HASTINGS L.J. 917, 954 (1975).
4. HOUSE COMM. ON GOVERNMENTAL OPERATIONS, THE USE OF POLYGRAPHS AND SIMILAR DEVICES BY FEDERAL AGENCIES, H.R. REP. NO. 795, 94th Cong., 2d Sess. 5 (1976).
5. REID & INBAU, TRUTH AND DECEPTION 5 (2d ed. 1977). Excess muscle movement by the person being tested may be taken as evidence of deception. *Id.* at 258.

shifty eyes, a quaver in the voice or the bobbing of the Adam's apple are thought to reveal the tension involved in lying.[6] The polygraph cannot detect a lie, but only the emotional arousal associated with trying to deceive the examiner.[7] Thus, the examiner must contend with a number of problems. In order to make the subject tense about lying, the subject must be persuaded that it will be difficult or impossible for him to deceive the examiner. Therefore, proper testing procedure includes convincing the subject that the polygraph is accurate.[8] However, the polygraph examiner must be careful not to accuse the subject. Such an accusation could so disturb an innocent subject that he may "display deception reactions on the test or else the Polygraph tracings will be too distorted to permit a diagnosis of deception or truthfulness."[9] Thus, the polygraph examiner, must control the amount of anxiety in the subject.[10] Additionally, the polygraph examiner must formulate a set of control and relevant questions so that he can evaluate the difference in the subject's response to the relevant questions and control questions.[11] This is a fairly complex task.[12]

The polygraph examiner also considers subjective factors such as subject's response to the examiner's boast that the examiner will uncover the truth, subject's willingness to mention other suspects, subject's response to being confronted

6. *Id.* at 1.
7. *Id.* at 5.
8. *Id.* at 43.
9. *Id.* at 17.
10. Reid and Inbau suggest procedures for insuring that a dishonest subject who volunteers to take the test (or who is paying for the test for his use only) not be so free of tension that he is able to mask his deception. *Id.* at 13 n.15 and 15.

    The ability of the examiner, either intentionally or unintentionally, to influence the outcome of the test is stressed in an article highly critical of polygraphs. Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie-Detection*, 70 YALE L.J. 694, 711 (1961).
11. REID & INBAU, *supra* note 5 at 28-30, and 146-150. In some cases the mere fact of a greater response to a relevant question is in itself inculpatory. Assume, for example, a murder in which innocent people do not know what the murder weapon is. An increased physiological response on the part of the suspect when asked about the murder weapon as compared to questions about alternative weapons would be a strong indication of involvement. *See* REID & INBAU, *supra* note 5, at 55. However, in the *Cullin* case the relevant questions dealt with defendant's intention in getting a gun and approaching her common law husband. A third control question was whether defendant intended to answer the polygraph examiner's questions truthfully, Cullin v. State, *supra* note 1, at 453-54 n.4. Clearly, defendant, even if innocent, recognized the relevant questions and might be expected to respond more to them, knowing that whether or not she would be tried for murder depended on her responses to these questions.

    The speculation is offered that polygraph tests in which the innocent subject can readily recognize the control questions may be less accurate than tests in which the innocent suspect cannot recognize the control questions. *See* Skolnick, *supra* note 10, at 709.
12. REID & INBAU, *supra* note 5, at 13-70.

with implicating evidence, subject's delay in answering questions, subject's willingness to endorse an exculpatory but fictitious explanation of the events under investigation, subject's view toward the perpetrator of a crime under investigation, subject's enthusiasm for the polygraph test he is taking and subject's confidence that the test will vindicate him.[13]

In view of the complex role of the polygraph examiner, polygraph proponents as well as critics stress that the validity of the exam depends on the examiner's ability and integrity as well as on the physiological measurements.[14]

A crucial question concerning the admissibility of polygraph data is: what is the probability that a given test will be wrong? Both proponents and critics of polygraph testing agree that there is little data on the validity of polygraph tests given in actual investigations.[15] Many laboratory tests of the polygraph show a high degree of accuracy[16] but are obviously subject to the criticism that there is a great deal of difference between laboratory subjects and persons under investigation whose futures may depend on the results of the test.[17] Also, laboratory tests allow far greater control of the variables.[18]

For the reasons discussed, it is not possible to arrive at a solid estimate of the probability that any given polygragh test will be wrong. Reid and Inbau claim a *known* error rate of less than one percent in properly administered tests; however, in an additional five to ten percent of the cases no diagnosis can confidently be made.[19] However, even if the per-

13. *Id.* at 17-20.
14. *Id.* at 5. *See also* Skolnick, *supra* note 10, at 705-06. The qualifications necessary for a polygraph examiner are the subject of considerable controversy. The American Polygraph Association requires, *inter alia*, a college degree and the experience of administering at least 200 tests for membership. Annot., 53 A.L.R.3d 1005, 1009 (1973). Generally, the federal agencies which use polygraphs require fairly lengthy training periods of the examiners. H.R. REP. NO. 795, *supra* note 4, at 32-35. Some case law on what constitutes a well qualified polygraph examiner is provided in notes 41 and 44, *infra*.
15. Polygraph proponents REID & INBAU, *supra* note 5, at 303-04, state, "A statistical determination of the accuracy of the Polygraph technique is practically impossible . . ." The Law Enforcement Assistance Administration of the United States Department of Justice, in response to questioning by the House Committee on Government Operations, *supra* note 4 at 12-13, stated, "the effectiveness of the lie detection technique when it is used on criminal suspects outside of the laboratory has never been adequately resolved . . . claims (of high accuracy by polygraph examiners) are unsubstantiated, and their statistics were based upon total cases rather than confirmed cases . . ."
16. H.R. REP. NO. 795, *supra* note 4, at 13.
17. Skolnick, *supra* note 10, at 709.
18. *Id.* at 708-711.
19. REID & INBAU, *supra* note 5 at 304. *But see* note 44, *infra*.

centage error rate of polygraphs in general were known, serious statistical problems would remain in applying that information to particular situations. For example, suppose it is known for certain that one man on an island of 10,000 committed a murder and acted alone. Further assume that there is only a one percent chance that a polygraph test will be wrong, that polygraph tests are administered to all 10,000 men, and that definite results are obtained in all tests. The most likely result is that 100 innocent men (one percent of the 9999 innocent men) along with the guilty man will be inculpated by the test.[20] Certainly it would be absurd to argue that there is a ninety-nine percent chance that any given one of the 101 inculpated men is guilty. This hypothetical illustrates a case in which the accuracy of the polygraph is very high in those cases in which an innocent diagnosis is made but exceedingly poor in those cases in which a guilty diagnosis is made.[21] Since the incidence of innocent diagnosis far exceeds the incidence of guilty diagnoses, the overall accuracy is very high. In this hypothetical, involving a dragnet operation, the polygraph might be very useful for investigatory purposes but of very limited use in the courtroom. Other hypothetical situations might lead to a much more optimistic analysis of the value of polygraph data as courtroom evidence.[22]

Finally, some people cannot be accurately examined by the polygraph because of emotional disorders. For example, former Director of the Federal Bureau of Investigation, J. Edgar Hoover, urged the President's Commission on the As-

20. Of course, in this hypothetical there is a one percent chance that the guilty man would be excused by the Polygraph.
21. A good discussion of this phenomenon is found at Skolnick, *supra* note 10, at 715.
22. Consider the facts of the rape case of State v. Stanislawski, 62 Wis. 2d 730, 216 N.W.2d 8 (1974). Polygraph results showed the defendant to be telling the truth and the complaining witness to be lying. If it is assumed that the probability of a false result in either test is one chance in a hundred and if it is further assumed that the two tests were independent events, it follows that the chance that both tests are wrong is the product of the probability that each test is wrong, or one chance in ten thousand. In this example, had it been assumed that there was one chance in ten that the result of either would be wrong, then it would have followed that there was one chance in one hundred that both tests would be wrong if the two tests were independent events. Regardless of the precise probability that a given polygraph test will be wrong, it is obvious that concurring tests of two individuals promises much greater accuracy if it may be assumed that the tests of the two people are independent events.

Of course, if the same polygraph examiner administers both tests it can be argued that once he has finished the first test he will have a bias in approaching the second subject. However, if each of the subjects is tested by a different polygraph examiner, and each examiner is ignorant of the results of previous tests, it is difficult to see why the tests could not be independent events.

sassination of President Kennedy not to attach any significance to a polygraph examination of Jack Ruby conducted by the Federal Bureau of Investigation because of Ruby's mental condition.[23] Polygraph critics are quick to argue that the polygraph operators lack sufficient psychological training to accurately determine which test subjects have mental disorders which will prevent an accurate test.[24] As these considerations illustrate, the problem of determining the validity of the polygraph in real situations is also complicated by the fact that the validity may depend on the particular type of situation.[25]

Polygraph proponents argue that whatever the shortcomings of polygraphy, it is at least as accurate as eyewitness testimony or testimony from people whose motives for testifying are questionable.[26] Proponents might take grim satisfaction in the fact that in the case of *State v. Stanislawski*[27] the jury convicted the defendant of rape despite the fact, unknown to them because the trial judge ruled the polygraph data inadmissible, that state police polygraph examiners determined that the defendant was telling the truth and the complaining witness was lying.[28]

POLYGRAPH EVIDENCE IN CRIMINAL TRIALS IN OTHER JURISDICTIONS

Most American jurisdictions have held polygraph data, with or without stipulation, inadmissible in criminal trials.[29]

23. REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT KENNEDY 815 (1964).
For discussion of psychological studies showing that people with certain mental disorders are not good polygraph subjects *see* Note, *The Role of the Polygraph in Our Judicial System*, 20 S.C.L. REV. 804, 819 (1968); Burkey, *The Case Against the Polygraph*, 51 A.B.A.J. 855, 856 (1965).
24. *E.g.*, Skolnick, *supra* note 10, at 707 n.55.
25. Notes 11, 21, 22 and 23, *supra*, and accompanying text. *See also* REID & INBAU, *supra* note 5 at 420.
26. Tarlow, *supra* note 3.
27. Note 22, *supra*.
28. *Id.* The Wisconsin Supreme Court reversed and remanded primarily because the prosecutor had withheld other exculpatory data from the defendant.
29. The United States Supreme Court has suggested that the fifth amendment right against self incrimination prevents compelled testing to determine "guilt or innocence on the basis of physiological response," Schmerber v. California, 384 U.S. 757, 764 (1966), but has not considered the admissibility of voluntarily taken tests. In 1958 the United States Court of Appeals for the Tenth Circuit suggested that polygraph data is inadmissible. Marks v. United States, 260 F.2d 377, 382 (10th Cir. 1958), *cert. denied*, 358 U.S. 929 (1959). In 1969 the court was confronted by an appeal that a trial judge's refusal to admit polygraph results compromised the defense. The court avoided a reconsideration of the Marks decision on the grounds that the defendant during trial failed to offer a foundation for his polygraph data, but suggested that in a proper case it would be admissible. United

The first reported case involving the admissibility of a lie detector test is *Frye v. United States*.[30] In holding the defendant's offered evidence inadmissible, the court stated that such tests would have to be generally accepted among physiologists and psychologists before they would be admissible. The general acceptance test enunciated in *Frye*, as well as doubts about the validity of the polygraph test figure prominently in court decisions holding polygraph data inadmissible.[31]

Courts have also expressed the fear that polygraph tests would invade the province of the jury[32] or be given undue weight by the jury.[33]

Among courts which allow the admission of polygraph test results in criminal trials, three general holdings emerge.

First, some courts hold that if defendant stipulates that a polygraph test will be admissible, he waives his right to object to admission of polygraph data. In *State v. Bennett*,[34] an Oregon appeals court held that since the defendant had stipulated that the result of a polygraph test he took be admissible, the court was relieved of the duty of inquiring whether the polygraph data was reliable. The Missouri Supreme Court held that "[h]owever anamolous it may be, the parties, by stipulation, may waive objections to the admission of polygraph examinations and their results, and in that sense inbue them with reliability and probative value.[35] The Indiana Supreme Court[36] held that since defendant had requested a polygraph examination he would not be heard to complain

States v. Wainwright, 413 F.2d 796, 802-803 (10th Cir. 1969). *See* REID & INBAU, *supra* note 5, at 309-373, for a thorough discussion of the holdings of various state and federal jurisdictions on the admissibility of polygraph data and Annot., 53 A.L.R.3d 1005 (1973).

30. 54 U.S.App.D.C. 46, 293 F. 1013 (D.C. Cir. 1923).
31. *E.g.*, Marks v. United States, 260 F.2d 377, 382 (10th Cir. 1958) and State v. Steinmark, 195 Neb. 545, 239 N.W.2d 495, 497 (1976). *But see* LOUISELL & MUELLER, FEDERAL EVIDENCE § 105 (1977) for a thorough analysis of the Frye general acceptance test.
32. *E.g.*, United States v. Alexander, 526 F.2d 161, 168-169 (8th Cir. 1975).
33. *E.g.*, People v. Leone, 25 N.Y.2d 511, 255 N.E.2d 696, 700, 307 N.Y.S.2d 420 (1969); People v. Davis, 343 Mich. 348, 72 N.W.2d 269, 281, 282 (1955).
34. 17 Or.App. 197, 521 P.2d 31, 33 (1974). However, more recently an Oregon Appeals Court held as error a trial judge's reception of polygraph results over defendant's objection because the stipulation called for the exam to be administered by a licensed polygraph operator and the polygraph exam the defendant took was given by an unlicensed examiner. State v. Tavernier, 27 Or. App. 115, 555 P.2d 481, 482 (1976).
35. State v. Mick, 546 S.W.2d 508, 509 (Mo. 1976).
36. Reid v. State, 285 N.E.2d 279 (Ind. 1972).

about its admissibility on fifth amendment grounds. The opinion makes no mention of a foundation and does not indicate whether defendant also objected to the reliability of the polygraph. A Florida appeals court[37] held that defendant had even forfeited his right to question the qualifications of the polygraph examiner because he had stipulated to take an exam by a qualified and licensed examiner.

A second group of courts holds polygraph data admissible upon stipulation, but only if the court is satisfied that the examiner is highly qualified. Noting advances made in polygraph techniques, the Arizona Supreme Court in *State v. Valdez*[38] held polygraph data admissible upon stipulation if the trial judge deemed the tests reliable and if the examiner were available for cross-examination. In *Commonwealth v. A Juvenile*[39] the Massachusetts Supreme Court recently held that a defendant may stipulate in advance with the court to admit the results of a test regardless of its outcome. The prosecution is not a party to the stipulation. The Massachusetts stipulation procedure thus enables the defendant to experiment with polygraph testing before entering into a stipulation with the court that future tests by a different examiner will be admissible.[40] However, the Massachusetts court emphasized its concern that the examiner be highly qualified and urged that careful exercise of the trial judge's discretion in this matter would prevent the defendant from admitting into evidence a favorable polygraph result by an unqualified examiner.[41]

In *United States v. Oliver*,[42] the concern of the Eighth Circuit Court of Appeals over examiner qualification and integrity had a devastating effect on defendant. Defendant's own polygraph expert produced a favorable result. The indi-

37. Moore v. State, 299 So. 2d 119, 120 (Fla. App. 1974).
38. 91 Ariz. 274, 371 P.2d 894, 900 (1962). *See also* State v. Stanislawski, 62 Wis. 2d 730, 216 N.W.2d 8, 14 (1974).
39. 365 Mass. 421, 313 N.E.2d 120 (1974).
40. *Id.* at 127 n.8. Nothing in theory should prevent such pre-stipulation experimentation by the defendant in a jurisdiction in which the prosecution is a necessary party to the stipulation. But it is natural to speculate that a prosecutor might refuse to stipulate because he believed that previous unstipulated tests undertaken by defendant were exculpatory. On the other hand a prosecutor might stipulate to admission of a future polygraph test despite his knowledge that defendant had passed previous polygraph exams. He might do so either out of a sense of fairness or in the hope of trapping defendant in a United States v. Oliver type of situation, *infra*.
41. *Id.* at 126 n.7 the court noted that the proposed examiner had conducted between 22,000 and 30,000 polygraph exams.
42. 525 F.2d 731 (8th Cir. 1975).

gent defendant then asked the court for funds to take a second test and agreed that the results of the second test would be admissible. He failed the second test and the court ruled that the second test, but not the first was properly admissible. The court expressed serious doubts about the integrity of the first test[43] and justified admission of the second test partially on the basis of the impressive experience of the examiner.[44] However, it expressly reserved the question of whether the polygraph would be admissible absent a stipulation since it questioned whether the polygraph had gained general scientific acceptance.[45] Instead it justified admission in that case on the basis of Federal Rule of Evidence 401.[46]

Finally, a small minority of courts have held that polygraph results are admissible in criminal trials, with or without a stipulation, if an adequate foundation is laid. The New Mexico Supreme Court held that the refusal of the trial judge to accept defendant's offer of polygraph results was a denial of due process if the polygraph tests were reliable and relevant.[47] In *United States v. Ridling*[48] a federal district court cited advances in polygraphy, discounted fears that the jury could not be protected from undue influence by the polygraph, and allowed polygraph results to be admitted into evidence. A second federal district court ruled that defendant could introduce polygraph results, but was reversed on interlocutory appeal.[49]

Thus, among courts admitting polygraph data in criminal trials there is a clear dichotomy as to whether any sort of foundation must be laid concerning the polygraph result. Al-

43. *Id.* at 738.
44. *Id.* at 737 n.9 and n.13. The examiner testified that he had personally conducted more than 50,000 examinations which were subject to verification through supporting admissions, confessions or additional evidence. He estimated the accuracy of his decisions to be in excess of ninety percent.
45. *Id.* at 737.
46. FED. R. EVID. 401 defines relevant evidence as 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. The *Cullin* court cited the Federal Rules of Evidence as a reason for admitting polygraph data with a stipulation. Cullin v. State, *supra* note 1, at 458.
47. State v. Dorsey, 88 N.M. 184, 539 P.2d 204 (1975). In a later case the New Mexico Supreme Court upheld the refusal of a trial court to admit inconclusive polygraph results offered by defendant. State v. Bell, 90 N.M. 134, 560 P.2d 925, 929-930 (1977).
48. 350 F. Supp. 90, 94, 96 (E.D. Mich. 1972). This holding was criticized by the Eighth Circuit Court of Appeals, note 31, *supra*.
49. United States v. Zeiger, 350 F. Supp. 685 (D.D.C. 1972), *rev'd*, 155 U.S.App.D.C. 11, 475 F.2d 1280 (D.C. Cir. 1972).

though most courts require a foundation, a very few hold that stipulation is a substitute for foundation.

ANALYSIS OF THE CULLIN DECISION

The Qualifications of the Polygraph Examiner

It is obvious from the trial transcript[50] that the Powell Police chief, if indeed a polygraph expert, was very inexperienced. His training consisted of a full-time six-week course,[51] but he had not completed his take-home assignment of performing thirty polygraph tests.[52] In fact, the test which helped convict the defendant of murder was only the fourth polygraph test[53] he had ever given. He admitted to being nervous during the test[54] and to making several errors.[55] He testified that Wyoming does not license polygraph examiners and that he was ineligible[56] to join the American Polygraph Association.

The central fact of the inexperience of the polygraph examiner is important in interpreting the holding in this case. Many professional polygraph examiners as well as other experts maintain that extensive training and experience, if not full-time devotion to the field, is necessary to a claim of expertise in the use of the polygraph.[57] The Supreme Court holding in *Cullin* demonstrates a willingness[58] to admit as expert testimony the opinions of persons with very little polygraph training and experience. Thus, under *Cullin*, every police department, prosecutor's office or public defenders' office in the state may soon be able to boast a polygraph expert competent to testify in court.

50. Trial Transcript at 313-529 and 574-608.
51. *Id.* at 394.
52. *Id.* at 403-04. At 403 the Chief testified that he had given 18 tests since his "graduation" from his polygraph school. At 404 he testified that he was required to send in his first 30 tests in order to complete the course.
53. *Id.* at 403.
54. *Id.* at 477.
55. *Id.* at 494 the Chief admitted forgetting to put an "X" on one of the charts when the test ended in violation of good polygraph procedure. At 497 he conceded he crossed out an "X" because he put too many down. At 499 he admitted manually adjusting the pressure in the blood pressure cuff during the test and conceded that that would produce difficulties in comparing responses after the adjustment with previous responses. At 500 he admitted not checking the polygraph machine after each adjustment, although he conceded that it would probably have been good practice to have done so.
56. *Id.* at 506.
57. Note 14, *supra*.
58. The Cullin Court said, ". . . it was obvious that he [the Powell Police Chief] had an imposing knowledge of the theory and application of polygraph technology." Cullin v. State, *supra* note 1, at 459.

The Reserved Question in Cullin—Possible Reasons for Requiring Stipulation

The fact that it was necessary for Mr. Justice Rose to write a separate opinion suggests that the majority did not share his view that polygraph data should be admissible even without stipulation. There are at least four possible answers to the question: "By what logic should stipulated polygraph evidence be admissible when the same evidence without stipulation is barred?"

One answer is provided by the Oregon and Missouri cases, discussed above. If both sides agree to admit certain evidence then the court is absolved of any responsibility of insuring that the stipulated evidence is reliable. However, if there is any possibility that the polygraph results are unreliable—and the Oregon Appeals Court declined to inquire whether the polygraph results were reliable, the court abdicates a responsibility that it has no right to abdicate. Surely, it would not be proper for a court to allow both parties to stipulate that a person purportedly possessed of psychic powers would offer the jury an opinion on the defendant's guilt or innocence.

A second answer is provided by an estoppel theory if one believes that accurate polygraph testing is available to the defendant. In a *Cullin* type situation it might be argued that defendant is estopped from protesting the accuracy of the stipulated polygraph test to the extent of preventing its admission unless defendant offers more reliable polygraph results. It must be stressed that this view is only reasonable if it can be assumed that accurate polygraph testing is available to the defendant.

A third and far more preferable answer to Mr. Justice Rose's question is supplied by *Commonwealth v. A Juvenile* and *United States v. Oliver*, *supra*. In these two cases the stipulation requirement provides the court with an opportunity to police the qualifications of the polygraph examiner and other conditions of the polygraph test. Both the prosecution and the defense are protected from the introduction into evidence of suspect tests.

Yet a fourth answer is possible to Mr. Justice Rose's question. The uncertain accuracy of the polygraph discussed above suggests that the introduction of polygraph results might necessitate the testimony of psychiatrists and statisticians. Certainly Cullin might have introduced a psychiatrist at her trial to testify that she had a mental disorder which made it likely or possible that she would incorrectly be deemed to be lying by a polygraph operator.[59] Her brief on appeal contained statistical arguments against the validity of polygraph results and at trial she might have produced a statistician.[60] The prosecution might then have produced rebuttal experts on these points. Perhaps, the court or either party should have the option of refusing to engage in such a protracted battle, especially when the accuracy of polygraph data in actual cases remains open to question. A stipulation requirement might protect the party with the most limited resources from such a battle.[61]

A lawyer arguing against admission of polygraph results when there is no stipulation[62] will have to provide a satisfactory answer to Mr. Justice Rose's question. Therefore, it is appropriate to analyze the four answers just suggested in terms of compatibility with the *Cullin* opinion.

The first two answers suggested above would appear to be precluded by the *Cullin* court's statement that, "we do not base admissibility of polygraph results solely upon the basis of stipulation. There should be some test of reasonable reliability before final admission by the judge, even though the parties agree."[63] But this assurance is somewhat undercut by the *Cullin* court's apparent endorsement[64] of the admission

59. Note 23, *supra*, and accompanying text. The idea of psychiatric testimony to impeach a polygraph result is suggested by events following the assassinations of President Kennedy and Lee Harvey Oswald. After Jack Ruby secured a promise from Chief Justice Earl Warren that he be given a polygraph test, an attorney representing the Ruby family advised the Federal Bureau of Investigation of psychiatric evidence suggesting that a polygraph examination of Ruby would be unreliable. Ruby, however, insisted on taking the test. REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT KENNEDY, *supra* note 23, at 808-09.
60. Note 21, *supra*, and accompanying text.
61. The cases discussed in this note have all involved polygraph tests taken by the defendant. However, if polygraphs were admissible without stipulation it is conceivable that the prosecution could use polygraph data to great advantage without involving the defendant. For example, the credibility of an otherwise thoroughly disreputable prosecution witness might be greatly enhanced in jurors' minds by the testimony of a polygraph operator that the witness was telling the truth.
62. As discussed in note 61, *supra*, the prosecutor may wish to use polygraph results to enhance the reliability of his witnesses.
63. Cullin v. State, *supra* note 1, at 457.
64. Note 58, *supra*.

into evidence in a murder trial of the fourth polygraph ever administered by the Powell Police Chief.

In addition, the *Cullin* court expressed great concern that it would be unfair to prevent the state from using the polygraph evidence after both the state and the defendant stipulated to its use.[65] The court noted that the defendant produced her own polygraph expert who, though he disagreed with the results of the polygraph examination produced at trial, did not run an independent test on the defendant.[66] The trial record shows that the trial court sustained the defense's motion, made in chambers, to prevent the prosecution from questioning the defendant on polygraph tests she allegedly took in Denver, presumably while shopping unsuccessfully for a favorable result.[67] The trial record also shows that the prosecutor stated in chambers that defendant refused to take further polygraph tests, contrary to the prosecution's understanding of the stipulation.[68] The strong implication of that testimony is that any inadequacy of the polygraph data presented at trial was the fault of the defendant. The Supreme Court noted that both the defense and the prosecution polygraph experts testified at the *Cullin* trial that the polygraph is highly accurate when properly used.[69] The speculation is offered that the Wyoming Supreme Court might be sympathetic to a prosecutor's argument that if defendant stipulates to the admission of a polygraph test, then, unless defendant offers a more accurate polygraph test, defendant is estopped from objecting to the admission of the polygraph test because it is inaccurate.

Of course, a defendant appealing to the Wyoming Supreme Court in a *Cullin* type situation would urge that the answer to Mr. Justice Rose's question is properly provided by *Commonwealth v. A Juvenile* or *United States v. Oliver*, *supra*. Those two cases held that stipulation is necessary to enable the court to insure the quality of the polygraph results. The Wyoming Supreme Court should be receptive to such an answer since the *Cullin* decision stated that polygraph results, to be admissible, must also pass some test of

65. Cullin v. State, *supra* note 1, at 457.
66. *Id.* at 459.
67. Trial Transcript at 675-76.
68. *Id.* at 439-440.
69. Cullin v. State, *supra* note 1, at 459.

reasonable reliability. However, in *A Juvenile* and *Oliver* the court was a party to the stipulation, unlike the situation in *Cullin*.

Finally, it is unlikely that the Wyoming Supreme Court would accept the fourth possible answer suggested here to Mr. Justice Rose's question. In light of the court's discussion of the polygraph results in *Cullin*, it is unlikely that the Court would decide that polygraph data is so difficult to interpret that it should only be admitted in special, stipulated cases.

The Practical Dilemma Created by the Cullin Decision

The *Cullin* holding creates a dilemma for a person being investigated for a crime who wishes to consider using polygraph data in his defense in the event that he is brought to trial. Since the State is a necessary party to the stipulation, the prosecutor may require a suspect to immediately stipulate to the admissibility of a polygraph test in a possible trial. If the suspect refuses to so stipulate he may find himself precluded from being able to use polygraph results in his defense if he is brought to trial. If the suspect wishes to use polygraph data the prosecutor may be able to force the suspect into stipulating that the test be conducted under questionable circumstances, *e.g.*, by a fledgling polygraph operator. The result, as in *Cullin* where the fourth test given by a polygraph operator was used in evidence in a murder trial, can be an unnecessary affront to the administration of justice.

Accordingly, under *Cullin* the defendant who wishes to use polygraph results in his defense, but is unable to agree to a stipulation with the prosecutor faces considerable uncertainty. The four possible answers to Mr. Justice Rose's question discussed above suggest that the admissibility of polygraph results, absent a stipulation, is a genuinely open question in Wyoming. Although the New Mexico holding that it is a denial of due process to prevent a defendant from presenting polygraph evidence in his defense has some appeal, no other court has endorsed that holding and few courts allow defendant to admit polygraph results without approval of the prosecutor. Certainly a Wyoming defendant who wishes to introduce polygraph evidence cannot count on by-passing the prosecutor. And in view of all of the difficulties with poly-

graph interpretation discussed above, there may be very few cases in which it will be wise for the defendant to stipulate to admissibility of polygraph tests with the prosecutor.

CONCLUSION

The ultimate question of whether the admission of polygraph results in criminal trials promotes or hinders justice is a difficult one. The answer would appear to depend on two factors: the accuracy of polygraph tests and policy considerations.

It should be obvious from the foregoing discussion that polygraph tests are substantially more difficult to evaluate than tests based only on physical evidence. While it is not known how accurate the polygraph can be in criminal trials, it would appear that a court will have to expend considerable energy if it attempts to insure that admitted polygraph evidence is as accurate as possible. Such a policing effort on the part of the court might include rejection of polygraph results based in part on subjective evaluations by the examiner as well as a careful inquiry into the examiner's qualifications and the conditions under which the test was administered. The policing effort might also include psychological evaluation of the polygraph subject by psychiatrists or clinical psychologists to determine if any psychological problems might render the polygraph examination inaccurate. Of course, such an effort on the part of the court would not answer the question of how accurate polygraph examinations are in criminal trials. But, that kind of effort would seem necessary if a court, following its decision to admit polygraph results, attempts to administer justice as accurately as possible.

There are numerous policy considerations which bear on the question of whether polygraph results should be admissible. If a court believes that the admission of polygraph data will necessarily be an expensive and time consuming process it might decide against admissibility. However, the court should be extremely uneasy turning a deaf ear to a defendant who claims that if he is not allowed to introduce polygraph evidence he will be wrongly convicted. But if the court allows the admission of exculpatory polygraph data it would also seem necessary to make some provision for the admission of

inculpatory polygraph data, for otherwise a powerful incentive for abusing polygraph data would exist for the defense. Another policy consideration is that if the use of polygraph tests becomes common in criminal trials, the failure of a defendant to submit to a polygraph examination may prejudice the jury, even if not adverted to by the prosecution.[70] Yet another policy consideration is that too much weight might be attached to the polygraph results. For example, in an assault trial in which the defendant claims self-defense, prior convictions of the defendant for assault are relevant evidence but they are not admissible for fear that too much weight would be attached to them. Similarly, it might be argued that polygraph results are too prejudicial to admit since the polygraph results purport to answer the ultimate question: Is defendant lying? Finally, in a criminal trial in which a plea of self-defense is raised there is a policy question which should at least be considered by the defense. The plea of self-defense may serve as a vehicle for allowing a jury to render a merciful verdict. The defense should be wary of risking foreclosure of that jury option.

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70. H.R. REP. NO. 795, *supra* note 4, at 19.