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It is submitted that the Maryland court reached the correct decision in the *Shoemaker* case since it is very likely that the jury's verdict was influenced to the prejudice of the defendant because of the state attorney's inference that its responsibility could be shifted to another body.

In considering a proper approach at the trial level, it is important to bear in mind that guilt and punishment are two distinct issues and the subject of pardon should have absolutely no bearing on the determination of guilt. It is therefore suggested that where there is no procedural separation for the determination of the two issues, the prosecuting attorney should not be allowed to make any reference to the matter since the natural effect of such a reference coming from the prosecution would lead the jury to conclude that the subject is a proper consideration in determining guilt or that some of its responsibility may be shifted to another body and that any mistake which it may make will later be cured by the executive branch.

ROBERT G. BANNON

ADMITTING LIE-DETECTOR RESULTS BY STIPULATION

Lie-detector tests have yet to achieve judicial acceptance, their results being generally held inadmissible in evidence.[1] Objection to admissibility is generally placed on the ground that the test has not yet achieved scientific reliability.[2] There is no simple answer to the problem of determining reliability of such tests.[3] Authorities in the fields of psychology and physiology, who are best acquainted with the theory and nature of the deception apparatus and technique, are in disagreement.[4] Until there is some degree of unanimity within the scientific world as to the reliability of the machine, the courts will not

[1]See 3 Wigmore, Evidence § 999 (3d ed. 1940, Supp. 1962); 2 Wharton Criminal Evidence § 666 (12 ed. 1957); Annot., 23 A.L.R.2d 1306 (1952, Supp. 1962).

[2]Frye v. United States, 293 Fed. 1013 (D.C. Cir. 1923); People v. Becker, 300 Mich. 562, 2 N.W.2d 503 (1942); Henderson v. State, 94 Okla. Crim. 45, 230 P.2d 495 (1951); State v. Bohner, 210 Wis. 651, 246 N.W. 314 (1933). See cases collected in Annot., 23 A.L.R.2d 1306, 1308 (1952, Supp. 1962).

[3]See Inbau & Reid, Lie Detection and Criminal Interrogation, 110 (3d ed. 1953) where an attempt is made to determine the accuracy of lie-detector tests given under ideal conditions.

[4]The results of a survey suggest that the psychology profession does not have an answer to the question of "general scientific recognition." Cureton, A Consensus as to the Validity of Polygraph Procedures, 22 Tenn. L. Rev. 1, 18 (1953); Inbau & Reid, supra note 3 at 130.

accord full judicial recognition to the present lie-detector tests.[5]

The recent Arizona case of *State v. Valdez*[6] recognizes that an exception exists to this well established rule where parties have stipulated that the results of the test should be admissible in evidence. In *Valdez* the defendant was charged with possessing narcotics. Prior to trial, the parties signed a stipulation, agreeing that the defendant would take a lie-detector test and that the results would be admissible by either party. However, as the results were unfavorable to the defendant, he objected to the introduction of the examiner's testimony at the trial. The trial court allowed the disputed evidence to go to the jury, which found the defendant guilty, but certified the question of admissibility to the Supreme Court of Arizona.

The Supreme Court of Arizona, in a case of first impression, held that polygraphs and expert testimony relating thereto are admissible upon stipulation entered into by both parties.[7] The court stated that at the present time such evidence would be inadmissible in the absence of the stipulation. The few prior reported cases involving stipulations are not entirely consistent in their holdings.[8] Drawing upon the equivocation of the cases and the recognition that polygraphic interrogation has been considerably improved since 1923 when the leading case of *Frye v. United States*[9] was decided, the Arizona court recognized an exception to the general rule and thereby provided for admissibility in *Valdez.*

As the general rule against admissibility is founded on the absence

[5]3 Wigmore, Evidence § 990 (3d ed. 1940); Inbau & Reid, Lie Detection and Criminal Interrogation 122 (3d ed. 1953). The lie-detector tests in current use are systolic blood pressure test, and the tests conducted with the pathometer or the polygraph. These devices measure either blood pressure, respiration and pulse rate, or electrical impulses. Frequently a combination of two or more of them is used; and the devices operate on the premise that conscious telling of a lie produces a change in the normal readings.

[6]91 Ariz. 274, 371 P.2d 894 (1962).

[7]371 P.2d at 900.

[8]People v. Houser, 85 Cal. App. 2d 686, 193 P.2d 937 (Dist. Ct. App. 1948) (properly admitted); State v. McNamara, 252 Iowa 19, 104 N.W.2d 568 (1960) (properly admitted); Stone v. Earp, 331 Mich. 606 50 N.W. 2d 172 (1951) (non-prejudicial error to have admitted); State v. Trimble, 68 N.M. 406, 362 P.2d 788 (1961) (reversible error to admit); LeFevre v. State, 242 Wis. 416, 8 N.W.2d 288 (1943) (properly excluded). See State v. Lowry, 163 Kan. 622, 185 P.2d 147 (1947); Colbert v. Commonwealth, 306 S.W.2d 825 (Ky. 1957); State v. Arnwine, 67 N.J. Super. 483, 171 A.2d 124 (App. Div. 1962) implying that a stipulation would have cured the objectionable offer.

[9]293 Fed. 1013 (D.C. Cir. 1923).

of scientific reliability and recognition of the results,[10] it is worthy of note that the question of reliability was not resolved in *Valdez*. The court acknowledged that the techniques of lie detection have been improved, quoted the most recent statistics as to the accuracy of the tests, and then concluded that much remains to be done before the results can be admitted generally.[11] The sole ground for its decision was the stipulation by the parties.[12]

Before the decision in *Valdez*, the question whether a stipulation would be sufficient to distinguish the case from the long line of precedents against admissibility had never been expressly resolved with the deliberation that the Arizona court gave the question.[13] Legal writers have long maintained that the rule against general admissibility would not bar admissibility of the results if the test was given upon stipulation.[14] E. F. Inbau, a noted authority on lie-detectors, reports that as early as 1935 a Wisconsin trial court admitted lie-detector testimony as evidence upon stipulation.[15] There are records of other similar unreported cases.[16] However, appellate courts have almost in-

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[10]See Annot., 23 A.L.R.2d 1306 (1952, Supp. 1962); Hardman, Lie Detectors. Extrajudicial Investigations and the Courts, 48 W. Va. L. Rev. 37 (1941).

[11]371 P.2d at 898.

[12]Id. at 900.

[13]Held properly admitted upon stipulation, People v. Houser, 85 Cal. App. 2d 686, 193 P.2d 937 (Dist. Ct. App. 1948); State v. McNamara, 252 Iowa 19, 104 N.W.2d 568 (1960). Contra, State v. Trimble, 68 N.M. 406, 362 P.2d 788 (1961). Held results not having stature of competent evidence, Stone v. Earp, 331 Mich. 606, 50 N.W.2d 172 (1951). Held properly excluded, LeFevre v. State, 242 Wis. 416, 8 N.W.2d 288 (1943). Offer of polygraph tests refused, People v. Wochnick, 98 Cal. App. 2d 124, 219 P.2d 70 (Dist. Ct. App. 1950); State v. Cole, 354 Mo. App. 181, 188 S.W.2d 43 (1945); Beoche v. State, 151 Neb. 368, 37 N.W.2d 593 (1949); State v. Pusch, 77 N.D. 860, 46 N.W.2d 508 (1950); Henderson v. State, 94 Okla. Crim. 45. 230 P.2d 495 (1951); Peterson v. State, 247 S.W.2d 110 (Tex. Crim. App. 1952).

[14]Inbau & Reid, Lie Detection and Criminal Interrogation, 132-135 (3d ed. 1953); Wicker, The Polygraphic Truth Test and the Law of Evidence, 22 Tenn. L. Rev. 711, 726 (1953); Streeter & Belli, The "Fourth Degree": The Lie Detector, 5 Vand. L. Rev. 549, 558 (1952).

"The record of blood-pressure variations of an accused person, made during an interrogation while voluntarily submitting to the application of suitable apparatus (polygraph, electrocardiograph, "lie-detector") is admissible, either to corroborate or discredit his testimony." Wigmore, Code of Evidence § 975 (3d ed. 1942).

[15]State v. Loniello (1935) reported in Inbau, Detection of Deception Technique Admitted as Evidence, 26 J. Crim. L., C. & P.S. 262 (1935).

[16]State v. Rowe (1936); State v. Conn (1941) noted in 1943 Wis. L. Rev. 430, 435.

"Although the lie-detector is yet to be sanctioned by an appellate court, trial judges the country over, convinced of its merits, have admitted the results of lie-detector tests in evidence in unappealed and therefore unreported cases." An extensive list is appended. 29 Cornell L.Q. 535, 540 (1944).

variably held that the offered testimony was properly excluded or that the admission of the testimony of the examiner was reversible error, notwithstanding that the test was given and the results offered upon stipulation.[17] There runs throughout the opinions of the courts the idea that the general rule applies in all cases. Only two jurisdictions have held otherwise. California in *People v. Houser*[18] and Iowa in *State v. McNamara*[19] have held the evidence admissible upon facts similar to *Valdez*, but no attempt in either decision was made to establish an exception to the general rule against admissibility. In both these cases the tests were given following a stipulation; and both resulted in testimony unfavorable to the defendants, who objected to admission. The courts of both states affirmed the conviction of the defendants, passing on the question of admissibility with the statement that the defendants could not be heard to complain merely because the results were unfavorable to them.[20]

The holding in *Valdez* places great emphasis on the stipulation.[21] If the general rule against admissibility is recognized and accepted, as it was by the Arizona Supreme Court,[22] the stipulation must in some manner be regarded as a satisfactory substitute for a lack of recognized scientific reliability. It can only be tentatively said that the stipulation offers some guarantee of reliability that lie-detector tests given without a stipulation might not possess. The usual stipulation is an agreement not only as to the admissibility of the results but also as to the subject matter, time, place, and operator of the tests.[23] It is thus apparent that in this respect the stipulation offers certain safeguards against abuse in the use of the lie-detector that might otherwise arise in obtaining evidentiary results. Moreover, a stipulation can, in other instances, waive statutory and constitutional rights, in addition to providing for the admission of facts proved by evidence otherwise inadmissible.[24] Consequently, what the stipulation achieved in *Valdez*

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[17]See note 13 supra.

[18]85 Cal. App. 2d 686, 193 P.2d 937 (Dist. Ct. App. 1948).

[19]252 Iowa 19, 104 N.W.2d 568 (1960).

[20]People v. Houser, 85 Cal. App. 2d 686, 193 P.2d 937, 942 (Dist. Ct. App. 1948); State v. McNamara, 252 Iowa 19, 104 N.W.2d 568, 573 (1960).

[21]On the theory, nature, and evidentiary affects of stipulations in general see 9 Wigmore, Evidence §§ 2588-2597 (3d ed. 1940). The practice is formally termed judicial admission. Wigmore calls it a substitute for. evidence, for it does away with the need for evidence.

[22]371 P.2d at 898.

[23]Inbau & Reid, Lie Detection and Criminal Interrogation 135 (3d ed. 1953) gives a sample of the usual stipulation.

[24]9 Wigmore, Evidence § 2592 (3d ed. 1940, Supp. 1962).

by way of substitution is in keeping with the sound practice of judicial admission by stipulation.[25]

The court in *Valdez* has said that much remains to be done to perfect the lie-detector apparatus so as to make it fully acceptable.[26] Of course, this does not mean that the machine and technique have no value whatever. The court recognizes the present value of the lie-detector to the extent that if the parties are willing to stipulate the admissibility of the results, they must be relying on the effectiveness of the machine and of its operator, and consequently the court will not pass on their good judgment. Furthermore, the parties ought not to be heard first to claim that the tests are effective, and subsequently when the results are unfavorable, to assert that the results have no value.

Because of the nature of the case, *Valdez* stands for two propositions: the place of a lie-detector test in a criminal proceeding, and the value of a stipulation. First, because the scientific reliability of lie-detector tests is still tenuous, unrestricted recognition of the results cannot be granted at present. However, where the parties desire to use this means, they should be permitted to do so. This appears to be an equitable and intelligent position for the courts to take in regard to a scientific device that has constantly been used and improved since the turn of the century.[27] Secondly, the use of a stipulation has been held in high regard in other cases where it has been employed.[28] Admitting evidence of lie-detector tests taken upon stipulation guarantees the basic element of fair play between parties found in this evidentiary practice.

G. L. OUELLETTE

[25] Id. at § 2588.

[26] 371 P.2d at 898.

[27] See Inbau & Reid, note 23 supra, at 2-8 for the history of the lie-detector, especially the improvements thereon since the original.

[28] "Any other result would seem to be inconsistent with the general spirit and practice of our litigation, which judicially leaves to the parties the framing of their pleadings and issues and determines no objection not expressly raised by one of them. Moreover . . . the judicial refusal to recognize it [the stipulation] would often permit unseemly breaches of faith by counsel who have agreed to the admission." 9 Wigmore, note 24 supra, at § 2592.