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CONTENTS

Event-Related Potentials as an Indicator of Detecting Information in Field Polygraph Examinations Yoichi Miyake, Mitsuyoshi Mizutani, and Takehiko Yamahura	131
Advocating Alternative Sentencing: A Polygraph Examiner Role in the Political Economy of Alternative Sentencing Virgil L. Williams, Ph.D., Joe Morrison, J.D., and Joanne Terrell, M.S.W.	150
Employment Requirements of the Americans With Disabilities Act: Application to Law Enforcement Officers Jody M. Litchford	164
New Approach to Interviewing Children: A Test of Its Effectiveness Charles B. DeWitt	180
Review of Polygraph Case Law for 1992-1993 Norman Ansley	194
The Bibliographic Review Janet Kay Pumphrey	227

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EVENT-RELATED POTENTIALS AS AN INDICATOR
OF DETECTING INFORMATION IN
FIELD POLYGRAPH EXAMINATIONS

By

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Abstract

Several polygraph examinations were conducted to detect information which indicates whether the subject is lying or not. Both central and peripheral physiological responses of suspects were measured simultaneously. The purpose of this report is to assess whether the event-relative potentials (ERP) method provides a competent means of identifying concealed information in field conditions and the goal is to advance to the stage where this ERP technique is allowed to be presented as scientific evidence in court. All outcomes of polygraph decision were confirmed by the subject's own confession or delivery of judicial judgement. ERPs were recorded from Cz during 120 trials consisting 20 of critical, 80 of noncritical and 20 of target stimuli. Each stimulus was presented on a CRT screen for visual ERP or through headphones for audio ERP for 200 msec with a 900 msec ISI. The signals were sampled for 1000 ms (100 ms prior to stimulus). Baseline-to-peak amplitudes of late positive components (P300) were digitized and analyzed. The data of these case-investigations indicates that the ERPs appear to be sensitive to detecting information using electrophysiological manifestations of information-processing brain activity. The visual ERP is superior than the audio ERP, because of smooth elimination of noise components derived from EOG. Some limitations remain, however, in using the ERP method to confidently discriminate criminal information. The content concerning a crime seems to depend on individual differences in that some individuals evoke no discriminative ERP amplitude. Visual inspection of ERP waveforms often reveals differences between presented items regarding details of a crime. The final decision by ERP method results, in legal context, is deemed to be subjective in so far as it requires the visual inspection of ERP waveform. Finally, there have been many difficulties in that specific estimation techniques

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Event-Related Potentials as an Indicator of Detecting Information

are required to distinguish or represent waveforms of ERPs from practical procedures in detecting criminal information. In conclusion, the procedure in the present ERP method provides a partial support to apply this technique into the field situation.

Introduction

One type of polygraph test is known as the concealed information test (CIT) (Raskin, 1982). Several studies that systematically compared different physiological measures for detection of information were conducted to answer an important question with practical implications. It is far from clear that the different measures are equally efficient in detecting information or that the relative efficiency of the different measures depends upon the polygraph method being used. Only changes in skin resistance and in skin potential are efficient under the CIT, whereas no efficiency of other measures which are employed in field work (e.g., respiration and cardiovascular measures) was found (Ellson, Burke, Davis and Saltzman, 1952; Thackray and Orne, 1968; Cutrow et al., 1972; Podlesny and Raskin, 1978).

Recent experimental research concerning polygraph technique suggests that event-related potentials (ERPs) may provide an important new approach in detecting information in criminal suspects. These experimental procedures are closely related to the CIT. The CIT challenges the subject with a series of multiple choice questions, one of the choices for each question being a detail of which knowledge indicates guilt. Findings provide support for evidence that adaptation of the "odd ball" paradigm widely used in research on the cognitive significance of slow-wave components of ERPs is sufficient to show that deceptive subjects produce different responses to stimuli recognized as concealed information. The waveforms of the ERPs can be elicited by events belonging to rare and task-relevant categories, but not by frequent or irrelevant events. Given this differential responsivity, the ERP method would be available for the CIT for detecting information on guilty information paradigm of psychophysiological detection of deception (PDD). ERPs appear to be most sensitive to detecting information using electrophysiological manifestations of information-processing brain activity. In this paradigm a large number of stimuli are presented, of which some fraction have special significance. The averaged ERPs to the "odd ball" or target stimuli reliably shows a late-appearing positive slow wave, the P300 responses, nearly at 300 msec after stimulus onset. In the previous experimental detection of information concerning subject's name, Miyake et al. (1986, 1987) provided a level of statistical confidence for each individual identification for each individual subjects, resulting that elicits of different potentials to a critical (subject's name) visual stimulus displaying on the CRT, when compared with non-critical stimuli. In these studies they compared a total of three ERPs induced from various brain regions and concluded that ERPs responses at Cz were more sensitive than other different regions on brain recorded. The data provide

support that the average ERP waveforms indicate significant discrimination between critical and non-critical stimuli due to a hypothesis that differences of self-relevancy induce a different cognitive processing. Farwell and Donchin (1986) also found that deceptive subjects produce P300 responses to achieve perfect detection both of "deceptive" or "truthful" subjects. In the mock crime situation, the critical stimuli concerning the amount of stolen money elicited a large amplitude when compared with the non-critical stimuli in the "deceptive" subjects, whereas the critical stimuli elicited little or no difference with the non-critical stimuli in the "truthful" subjects (Miyake et al., 1988). In 1988 Rosenfeld et al. reported that subjects chose one item from a box of nine items and were asked to pretend that they stole it. One of the nine words corresponded to the chosen "stolen" item, eight others described novel items presented in a random order. The stolen item evoked the late positivity in ERP usually referred to as the P300 component. Several other studies with similar procedure using ERPs measures also support utility of ERPs measures (Taira et al., 1989; Forth et al., 1989) for detection of information, which data suggest that the average ERP waveforms can be used to detect crime-relevant information and this method could reliably improve the determination of whether a suspect had knowledge of a criminal event. And, in 1991 Farwell and Donchin were examining the effectiveness of a Guilty Knowledge Test using ERPs in lie-detection with a mock crime espionage scenario. A set of items were designated as "targets" and appeared one-third of the time. Probes related to the scenario also appeared on one-third of trials. The rest of the items were irrelevants. Subjects responded by pressing one switch following targets, and the other following irrelevants and probes. The probes elicited a P300 in most subjects when they were relevant to subject's "crime." A very small P300, if any, was elicited by the probes when the subjects were "Innocent."

These experimental findings indicate the ERP method would be applicable for detecting information with a guilty information paradigm. In this work, several field polygraph examinations were conducted using the peripheral and central physiological measures simultaneously to assess the efficiency of the ERP method.

Method

Subjects: A number of male suspects aged 25-45, including a suspicion of larceny, narcotics-related offense and burglary, confirmed by decisions of polygraph results by a post hoc survey of whether each subject confessed to commission of a concerned case, or by judicial outcomes (dismissals, acquittals, convictions).

Apparatus: Using an 8-channel multiple polygraph (model 6300, NIHON Kodan Co. Ltd.), a system to detecting information records ERPs at Cz with other peripheral responses (respiration: RES, skin potential response: SPR, TC=2.0 sec, finger pulse amplitude: FPA, TC=0.1 sec and heart rate: HR) simultaneously. This system also

Event-Related Potentials as an Indicator of Detecting Information

equipped with a personal computer (model PC9801VX21, NEC Co. Ltd.) that can be used for analysis of ERP waveforms to identify and estimate whether a subject has knowledge of criminal event. An automatic voice synthesizer was used for presentation of audio stimuli.

Procedure: Each subject was presented with stimuli belonging to each of three categories: "critical," "non-critical," and "target," under both "deceptive" and "truthful" test conditions. The ERP recording was done from Cz with 120 trials consisting 20 of relevant, 80 of irrelevant and 20 of target stimulus. Each stimulus was presented on a CRT screen for visual ERP for 250 msec with a 90 msec inter-stimulus interval, or through a headphone for audio ERP for 1000 msec with a 1850 msec inter-stimulus interval. Subjects were tested in one block of 120 trials. The stimuli consisted of targets, irrelevant and relevant, presented in a random order. Each subject was instructed to press a micro switch following the presentation of a target stimulus as quickly and accurately as possible. The target stimulus was presented with tone in audio situation, or with circle in visual situation. These field polygraph examinations were conducted using both peripheral and central physiological measure simultaneously including RE, SPR, FPA, and HR besides recording of ERP, because the field polygraph test was required under legal condition and also the usefulness of ERP method was compared with that of standard polygraph in detecting information.

Result

Table 1 shows examination of suspects conducted by multiple polygraph including standard and ERP methods. The number of suspects studied is 18 including 16 male and 2 female. The range of age is from 19 to 56. The cases include larceny, the cannabis control law and attempted murder. The items consist of time, place and role of act, kind of the object, amount of stolen money, method of object custody, method of entry, kind of weapon and number or names of accomplices.

Table 1. Outline of Examinations on Criminal Suspects Conducted by Multiple Polygraphy Including the Standard and the ERP Method

Number of Suspects	18 (Male, 16; Female, 2)
Range of Age	19 - 56 (Mean: 33.1)
Offenses	Larceny, The Cannabis Control Law, Attempt to Murder
Presented Items	Time, Place and Role of Act; Kind of the Object, Amount of money; Method of Object Custody; Method of Entry, Kind of Weapon; Number and Name of Accomplice

Figure 1 shows the records of RES, SPR, FPA and HR as measured by a conventional polygraph and EOG and EEG. After each examination, the EEG record was analyzed to obtain its ERP waveform pattern treated with averaging.

Several results on detection of information by the ERP method are demonstrated as follows.

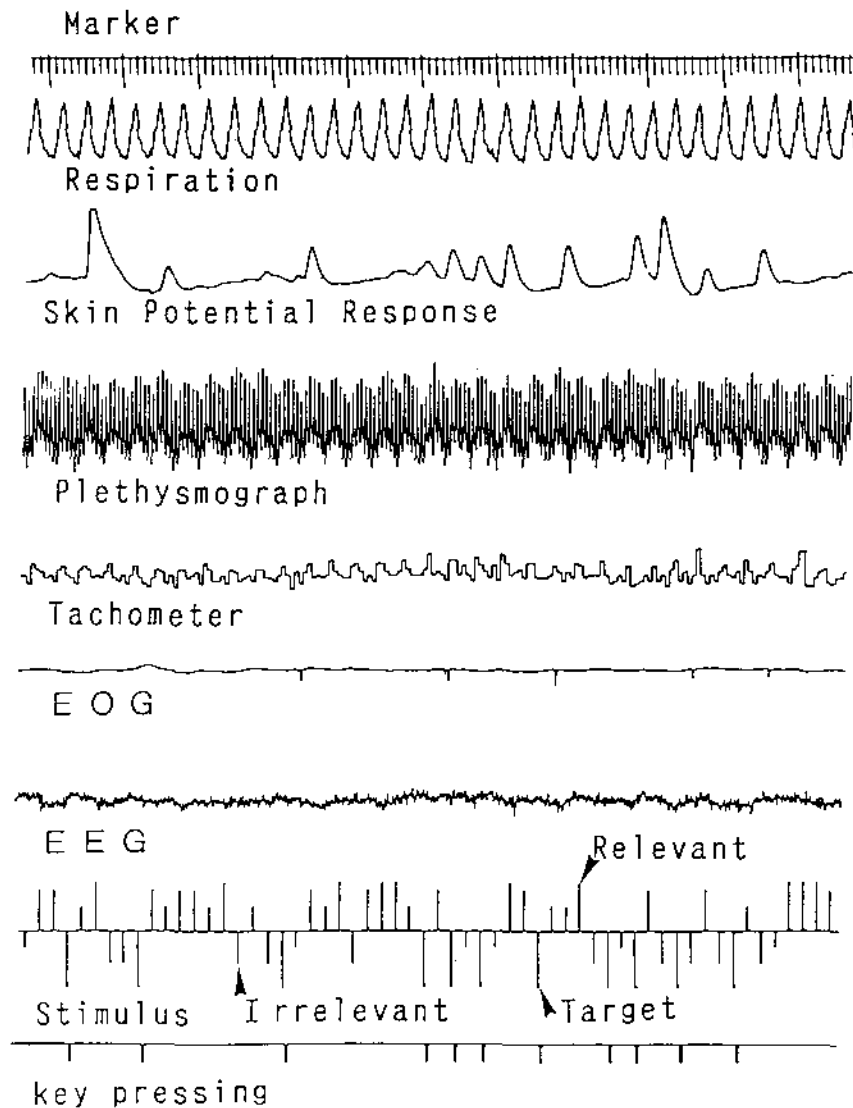


Fig. 1 Typical polygram by multiple recording procedure using an 8-Ch polygraph. Each record from the upper to the bottom shows the marker line for one sec notch; respiration curves, skin potential response (T.C. = 2 sec); photoplethysmograph (T.C. = 0.1 sec), tachometer, EOG (T.C. = 2 sec), EEG from Cz (T.C. = 2 sec) stimulus and key pressing.

Event-Related Potentials as an Indicator of Detecting Information

Figure 2 shows ERP at Cz elicited by relevant and irrelevant items concerning the name of accomplice, and target stimuli on a 28-year-old male suspected of an offense against the cannabis control law, which was indicative of deceptiveness regarding the name of the accomplice, since discriminative ERP waveform pattern was observed between relevant and irrelevant items, a conclusion which was later verified.

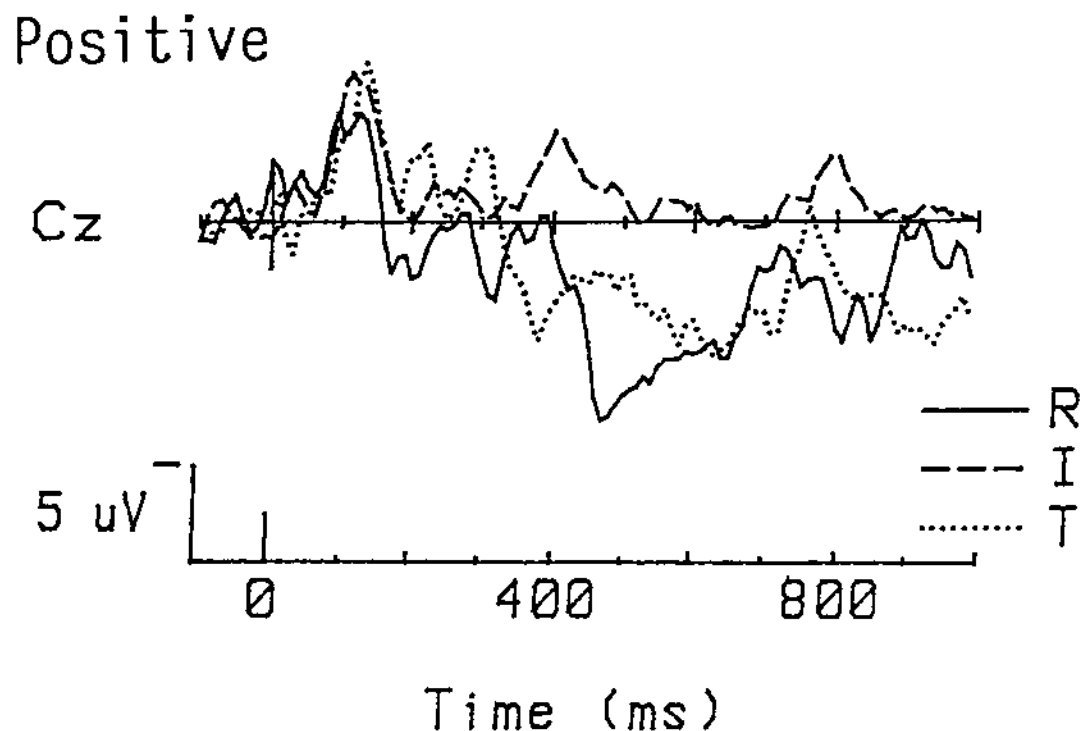
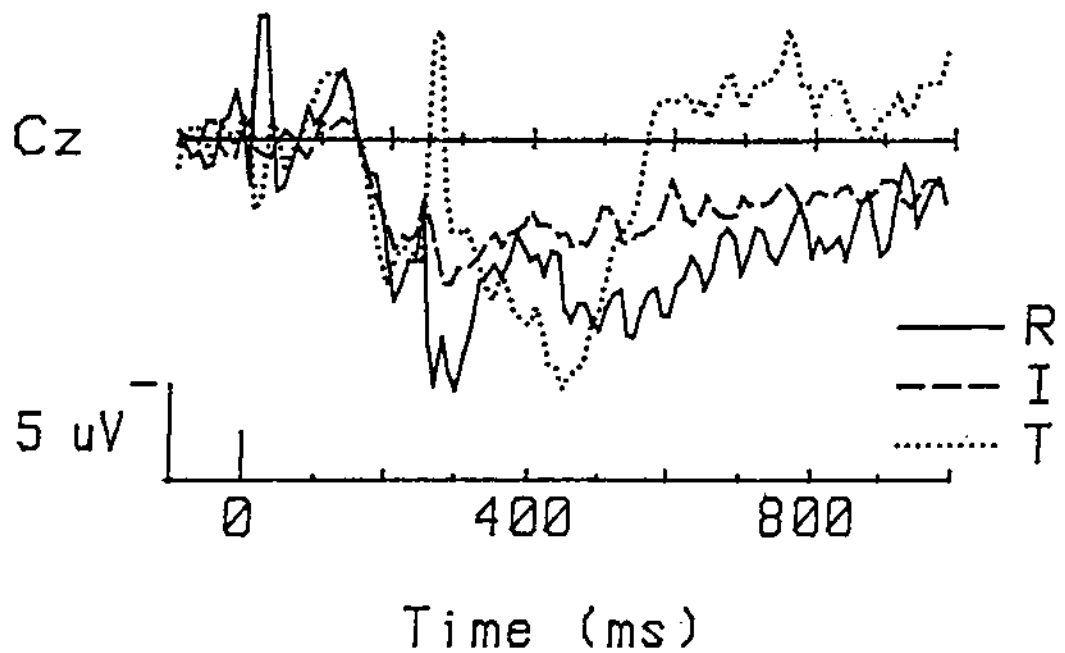


Figure 3 shows ERP at Cz elicited by relevant and irrelevant items concerning amount of money, and target stimuli on a 25-year-old male suspected of a larceny, which was indicative of deceptiveness regarding amount of stolen money, since discriminative ERP waveform pattern was observed between relevant and irrelevant, a conclusion which was later verified.

Positive



Event-Related Potentials as an Indicator of Detecting Information

Figure 4 shows ERP at Cz elicited by relevant and irrelevant items concerning the place of act, and target stimuli on a 24-year-old male suspected of a larceny, which was indicative of deceptiveness regarding the place of act, since discriminative ERP waveform pattern was observed between relevant and irrelevant, a conclusion which was later verified.

Positive

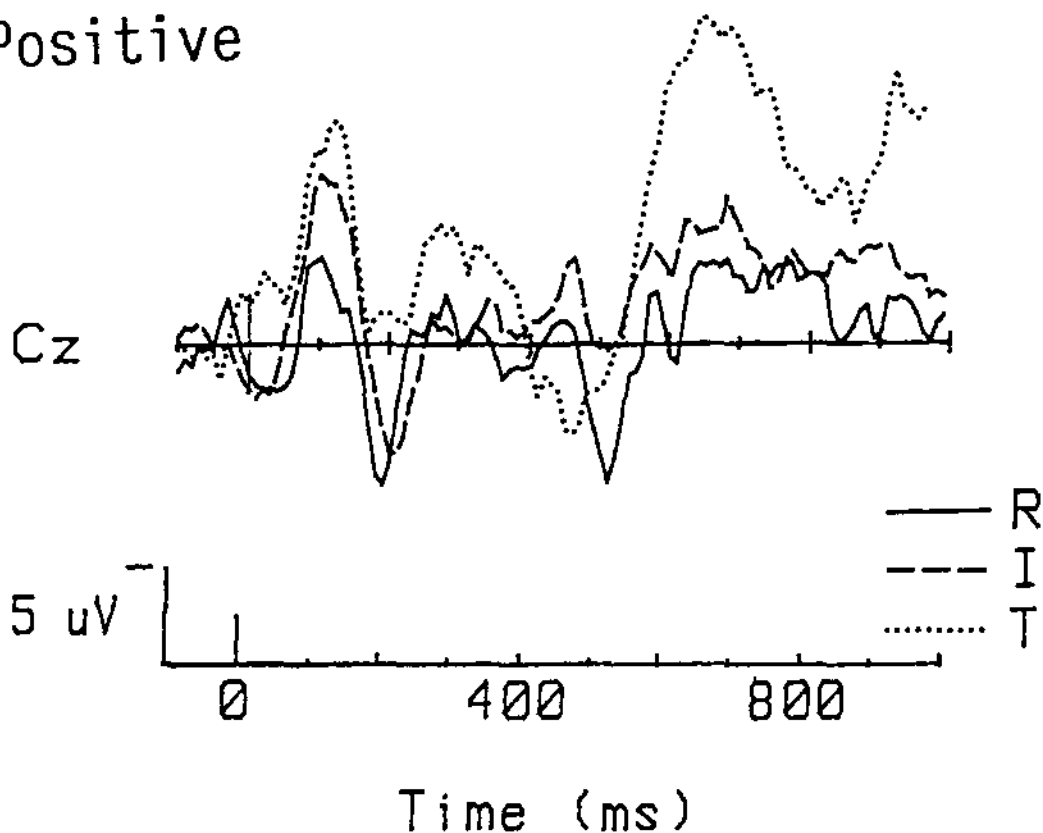
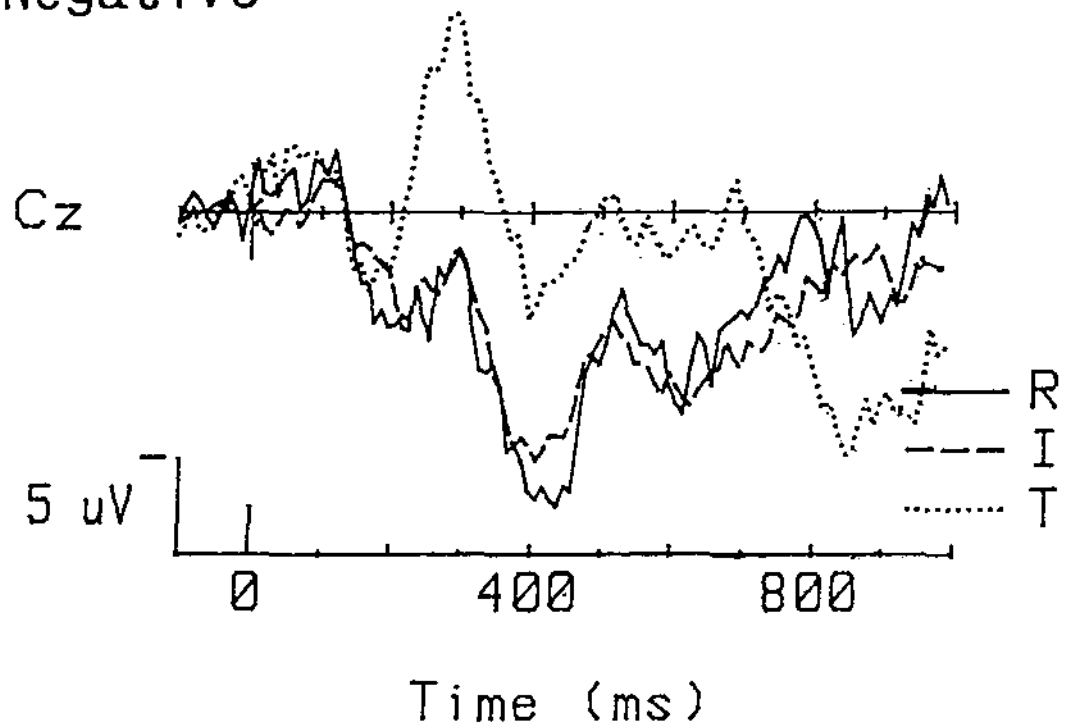


Figure 5 shows ERP at Cz elicited by relevant and irrelevant items concerning kind of object, and target stimuli on a 21-aged male suspected of a larceny, which was indicative of truthfulness regarding the knowledge of stolen object, since discriminative ERP waveform pattern was not observed between relevant and irrelevant, a conclusion which was later verified as accurate by the actual criminal's arrest.

Negative



Event-Related Potentials as an Indicator of Detecting Information

Figure 6 shows ERP at Cz elicited by relevant and irrelevant items concerning amount of stolen money, and target stimuli on a 23-year-old male suspected of a larceny, which was indicative of truthfulness regarding amount of stolen money, since discriminative ERP waveform pattern was not observed between relevant and irrelevant, a conclusion which was later verified as accurate by the actual criminals' arrest.

Negative

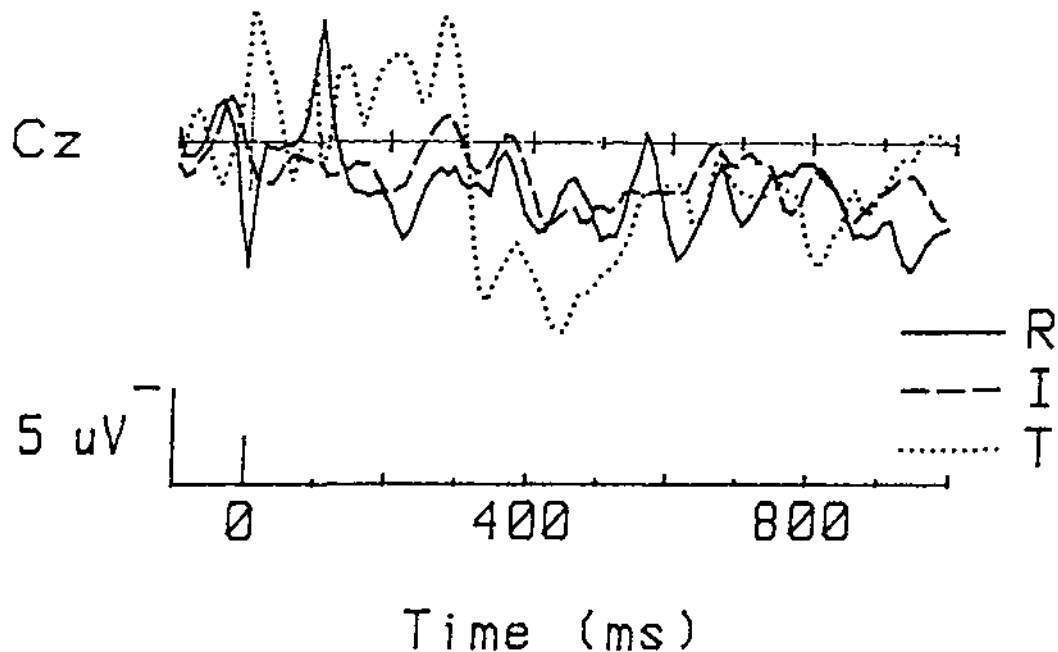


Figure 7 shows ERP at Cz elicited by relevant and irrelevant items concerning the time of act, and target stimuli on a 32-year-old male suspected of a larceny, which was indicative of truthfulness regarding the time of act, since discriminative ERP waveform pattern was not observed between relevant and irrelevant, a conclusion which was later verified as accurate by the actual criminals' arrest.

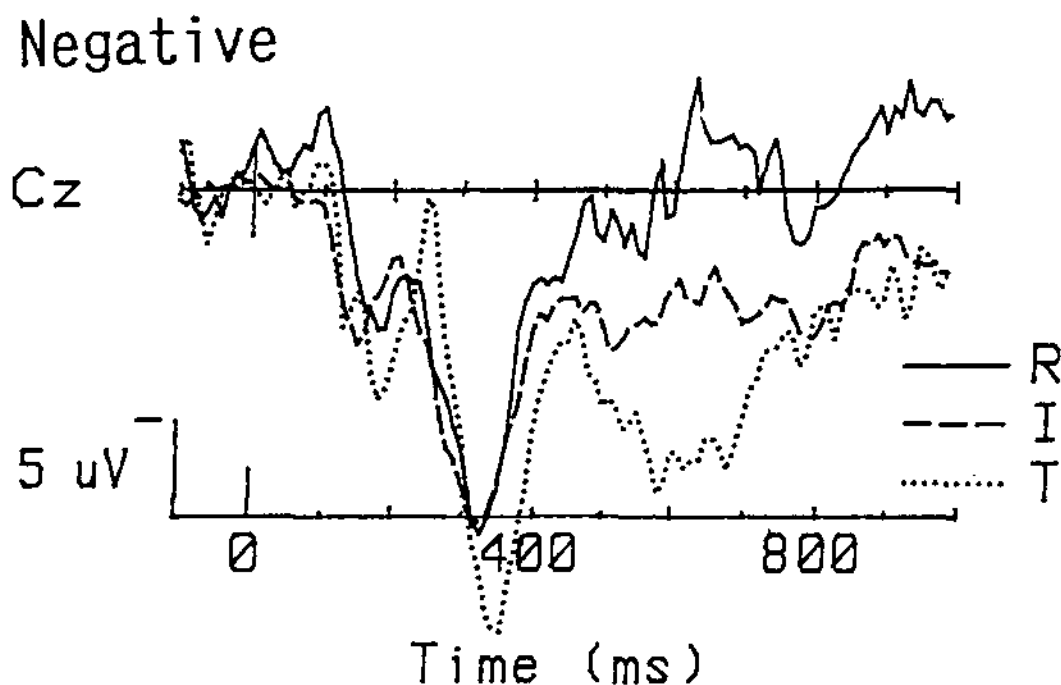


Figure 8 shows ERP at Cz elicited by relevant and irrelevant items concerning the place of act, and target stimuli on a 44-year-old male suspected of a larceny, which was indicative of truthfulness regarding the place of act, since discriminative ERP waveform pattern was not observed between relevant and irrelevant, a conclusion which was later verified as false negative by the subject's confession.

False Negative

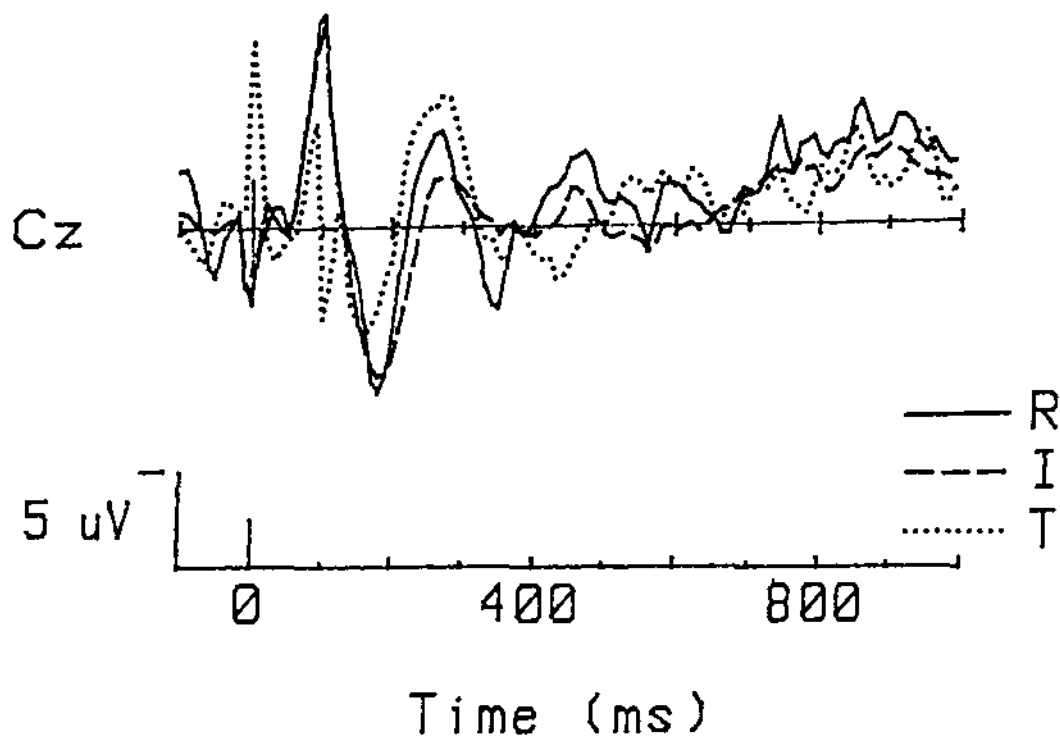
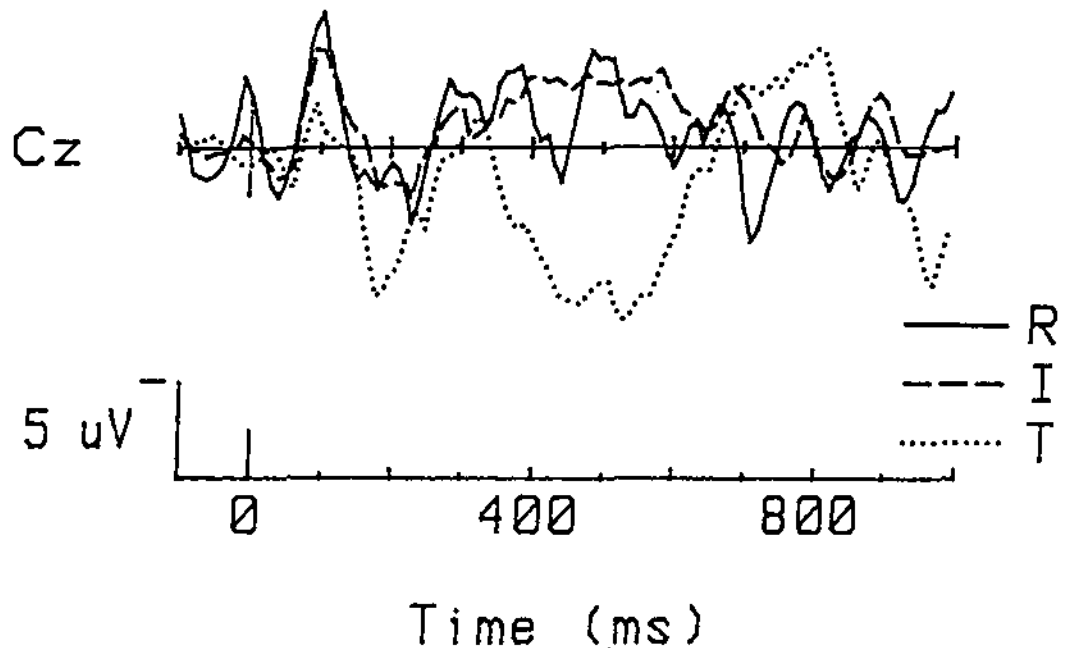


Figure 9 shows ERP at Cz elicited by relevant and irrelevant items concerning the role of act perpetrated, and target stimuli on a 55-year-old female suspected of a larceny, which was indicative of truthfulness regarding the role of act perpetrated, since discriminative ERP waveform pattern was not observed between relevant and irrelevant, a conclusion which was later verified as false negative by the subject's confession.

False Negative



Event-Related Potentials as an Indicator of Detecting Information

Table 2 summarizes outcomes of examinations conducted by the polygraph and the ERP methods in criminal suspects. Polygraph decision is diagnosed as truthful or deceptive. Diagnosis of ERP waveform includes discriminative, indiscriminative, inconclusive, and incomplete. And then, the right column shows the correspondence between polygraph and ERPs diagnosis. In this expression, the "positive" decision leads to the conviction of the suspect and the "negative" leads to the exoneration of the suspect. The audio stimuli to subjects 1 through 10 were presented, and visual stimuli to subjects 11 through 18 were done. In presented items, "recognition" means the knowledge of related a crime, for example, the time, the place of act, and kind of stolen object, so on. And "act" means the act of a subject's behavior in a crime, for example, the method of entry, or role played in a criminal at, so on.

The number of examinees tested in this study was 18. Ten of them were given the stimuli using audio, in which 7 of them were exposed to the "recognition" items and the remaining 3 were the "act" items. The remaining 8 subjects were presented with visual stimuli in which 6 subjects were given the "recognition" items and the remaining 2 subjects were given items regarding "act."

Table 2 Outcomes of Examinations Conducted by Polygraph and ERP Methods

Subject	Types of Stimuli	Presented Item	Diagnosis		Correspondence with Polygram
			Polygram	ERP waveform	
S 1	Audio	Recognition	Truthful	Indiscriminate	Negative
S 2	Audio	Recognition	Deceptive	Indiscriminate	False Negative
S 3	Audio	Act	Deceptive	Indiscriminate	False Negative
S 4	Audio	Recognition	Deceptive	Incomplete	X
S 5	Audio	Act	Deceptive	Inconclusive	?
S 6	Audio	Recognition	Deceptive	Discriminate	Positive
S 7	Audio	Act	Deceptive	Incomplete	X
S 8	Audio	Recognition	Deceptive	Incomplete	X
S 9	Audio	Recognition	Truthful	Indiscriminate	Negative
S10	Audio	Recognition	Truthful	Incomplete	X
S11	Visual	Recognition	Deceptive	Discriminate	Positive
S12	Visual	Recognition	Deceptive	Discriminate	Positive
S13	Visual	Recognition	Deceptive	Incomplete	X
S14	Visual	Recognition	Deceptive	Inconclusive	?
S15	Visual	Act	Deceptive	Indiscriminate	False Negative
S16	Visual	Act	Truthful	Indiscriminate	Negative
S17	Visual	Recognition	Truthful	Indiscriminate	Negative
S18	Visual	Recognition	Truthful	Indiscriminate	Negative

Figure 10 shows the aspect of decisions based on the ERP method in criminal suspects. Twelve out of the 18 subjects were judged to be "deceptive" and the remaining 6 as "truthful" by polygraph records, decisions which were later verified as accurate by the post hoc survey in which the suspect was sentenced for the offense. The remaining 6 identified as "truthful" were verified as accurate by the other suspect's confession and the successive court's decision.

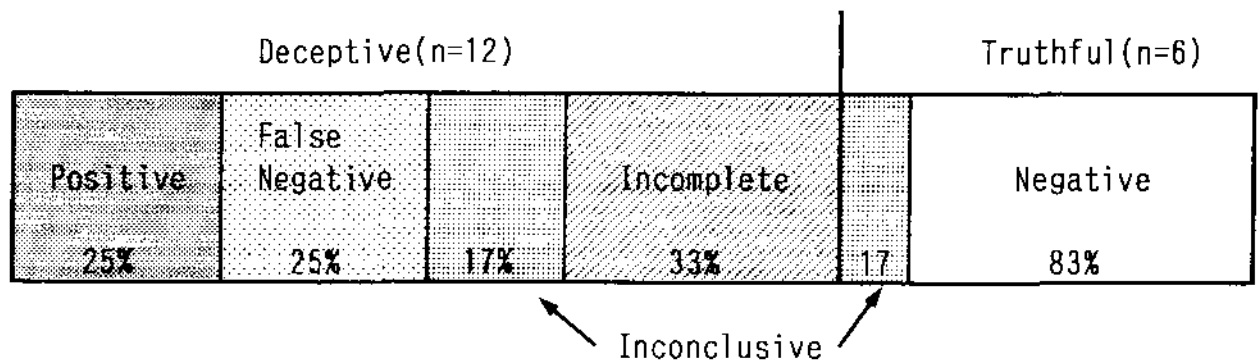


Fig. 10 An Aspect of Decisions based on the ERP Method in Criminal Subjects.

Considering the correspondence of decisions between the polygraph and the ERP method, the polygraph decisions in 8 of 18 subjects were in accord with those of the ERP method. Three cases (25% as a deceptive group) of the remainder were said to be positive, and the remaining 5 cases (83% as a truthful group) were reported as negative, which led to them being charged with each suspected offense. As a result, accuracy of the ERP method to detect information in criminal suspects was 44% as a whole; in which its results are biased in favor of a negative decision.

Among the 12 cases of deceptive decisions based on the polygraph method: 3 cases were diagnosed as the "false negative", 2 cases as "inconclusive" and 4 cases as "incomplete" by the decision of the ERP method. There was no false positive case based on the ERP method among six truthful cases by polygraph test. It is emphasized that application of the ERP method is effective in avoiding the false positive phenomena, which should be supported by a large majority of academic researchers in lie detection.

Event-Related Potentials as an Indicator of Detecting Information

Discussion

With regard to conducting the polygraph test on criminal suspects, there are some legal issues which apply to the use of another measure in field procedures, because of severe restriction by law enforcement authorities in Japan. Five conditions are generally required to admit the result of polygraph test as prosecuting evidence to the court. Results of polygraph examination must be subject to satisfaction of a) the subject's physiological normality, b) the expertise of the examiner, c) the use of valid techniques and d) documentation of outcomes. Adding to these conditions, e) the polygraph examination must be conducted by a standardized instrument which is able to measure more than three peripheral indices including respiration, electrodermal activity and cardiovascular activity (Yamamura and Miyata, 1990). Thus, it results that the 'polygraph test' does not include ERPs in a legal context, which gives sufficient reason to dispute the results obtained by ERPs due to the above mentioned rule. This raises the problems of lack of consensus or misunderstandings between the presently employed technique and use of ERPs among legal officers who are insensitive to the scientific ground of this technique. Most officers are convinced that a system of polygraph technique has already been established and needs no improvement. When the ERPs are employed in field situations, most lawyers who have a lack of knowledge about the polygraph test can not recognize its significance and utility, which results that in this technique appearing to be distrusted. These problems may be solved by application of simultaneous recording technique and analysis of data in field populations. In the present work, the standard polygraph examinations were done with the ERP method alternately in order to satisfy the official format.

Various authors conclude that guilty knowledge on a pseudo-criminal procedure in experimental condition have emitted the differences of ERP waveform between a critical and non-critical stimulus; and the ERP method supports its utility to detect crime-relevant information. Accuracy of the ERP method in this work was 44% as a whole, although it is biased in favor of a negative decision. The ERP method provides, as a result, partial support for its employment with criminal suspects to detect information and improve the confidence to determine whether a subject has no knowledge of a criminal event, because it arises no occurrence of false positive decision which should be perfectly prevented on field situation for criminal suspects. Data in this work suggests that the ERP method deserves consideration in applying it to detecting information. However, the fact that the false negative decisions were comparatively at a high level of occurrence indicates that some hesitation is necessary in applying this method to the field situation. Since the false negative decision creates an incompetent reputation as a 'detector', and often induces the mistaken acquittal of criminal, the field examiner has an antipathy to false negative phenomena.

In this work the most severe problem in the ERP method is the "incomplete" phenomena. Twenty-two percent of the subjects (4 out of 18 subjects) were diagnosed as "incomplete" in the analyses of the ERP waveform, due to contamination with noise components induced by the EOG or eye blinks. Although the subjects were instructed to maintain their eyes gazing steadily at a point on front of them in the visual stimuli condition, no elimination or decrease in noise components were observed. In field situation, the visual ERP seems to be superior than the audio ERP, because of smooth elimination of noise components derived from EOG. In either case, this is the major problem in applying the ERP method to the field situation, because 22% of subjects is a number which can not be disregarded if the ERP method actually functions. Furthermore the biased occurrence of incomplete phenomena towards deceptive dimension remind us of the ancient and famous Trovillo's comment that the nervous appearance of a subject is sufficient to prove his deceptiveness.

It is recognized that the content of information used to detect a crime seems to depend on individual difference, in that some individuals evoke no discriminative ERP amplitude, though some information concerning a crime shows significant discrimination of ERP waveform. Using the ERP method to make confident discrimination with any criminal information, however, has some limits. Three cases constituted an inconclusive decision (25% as a whole).

Finally, there have been many difficulties in that a specific estimation technique is required to distinguish or represent a waveform of ERPs from practical procedure in detecting criminal information. Visual inspection of ERP waveform often reveals differences between presented items about a detail of crime. The final decision by ERP method results, in legal context, is deemed to be subjective in so far as it requires the visual inspection of ERP waveform.

In conclusion, the ERP method was applied to several criminal suspects to evaluate its usefulness to detect information, concurrently with conducting the standard polygraph examination. ERP waveforms provided a partial support to detect information concerning details of a crime, but their discriminations are more effective with the item regarding the act than to one regarding the recognition. The ERP method in the real situation is apt to induce the noise components derived from EOG and eye blink which disturb the analysis of ERP waveform pattern. Accuracy of ERP method to detecting information is inferior to that of polygraph technique, caused by some kinds of lack of subject's setting to be involved in the test. Also, analysis of the ERP waveform pattern requires more sophisticated statistical devices such as the "boot-strapping" method.

Event-Related Potentials as an Indicator of Detecting Information

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**ADVOCATING ALTERNATIVE SENTENCING:
A POLYGRAPH EXAMINER ROLE IN THE POLITICAL
ECONOMY OF ALTERNATIVE SENTENCING**

By

Vergil L. Williams, Ph.D.
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Joanne Terrell, M.S.W.

It is not totally accurate to say that much is being written about polygraph's role in alternative sentencing. However, there is a small, but growing body of literature (Ansley, 1992 & 1989). The earliest report on a formal program involving the use of polygraph in probation supervision is by Oregon State Police Examiner Lloyd Reigel (1974). Almost a decade ago Abrams and Ogard (1986) reported in Polygraph concerning ongoing work with polygraph probation surveillance. Abrams updated reports of the extent of such work being done in the Northwest in the American Polygraph Association journal in 1991 and in oral presentations at the 1992 annual meeting of APA in Orlando. At the Orlando seminars, Dennis R. Fox presented instruction on use of the polygraph for testing sex offenders on probation, thus bringing up to the minute material that he had published in Polygraph earlier that year (1992). Scott Manners, now a veteran in giving instruction throughout the United States on such testing, presented materials at the annual APA meeting as well.

This trend in the polygraph literature, and the amount of time devoted to it in the 1992 annual meeting, gives one the feeling that commercial polygraph examiners are poised to assume new responsibilities in polygraph probation surveillance that will be a cure for the underemployment in the field caused by the passage of the Employee's Polygraph Protection Act. Yet, the authors find that many polygraph examiners are not aware of the trends toward using polygraph as a tool in community corrections. Furthermore, those who have heard of it recently are not at all sure that they want to be involved in a project that keeps convicted child sex molesters out of prison.

Dr. Williams is a Professor of Criminal Justice at the University of Alabama, an examiner and a member of the APA. Professor Morrison is Senior Staff Attorney at the University of Alabama Law School Clinical Program. Ms. Terrell was the first director of the Tuscaloosa Alternative Sentencing Program. For copies of the article write to Dr. Williams at the Department of Criminal Justice, The University of Alabama, Box 870320, Tuscaloosa, 35487-0320. Note: A variation of this paper was presented in an oral presentation before the Thirty-Third International Atlantic Economic Conference, Nice, France, 7 April 1992.

It is this hesitation, sometimes revulsion, that the authors discuss in the following pages. We are new to alternative sentencing -- having participated in the start-up and on-going operation of an alternative sentencing program in a mid-sized Alabama city (Tuscaloosa). Morrison and Terrell are directly involved in the daily operation of the program from its base in the Public Defender's Office. Williams provides polygraph probation surveillance to a select few clients of the program who are hard to supervise for various reasons. No sex offenders are recommended for the program unless they agree to periodic polygraph testing. The Tuscaloosa program is small by comparison with the big jurisdictions and is still relatively new after one year of operation. It is partly due to this beginners status that the authors are able to offer some insights on the politics of implementing a program of this type. We argue that polygraph examiners should not only accept the inevitability of increasing use of alternative sentences, but should be advocates for the technique and active participants in making it work.

The polygraph examiner code of ethics depicts us as impartial seekers of the truth. Most commercial examiners, we argue, carry out that mandate in the same spirit that prosecutors practice their mandate. Prosecutors do protect the occasional innocent who wanders their way, but do not really feel productive until they have convicted someone. Commercial examiners, many of whom are ex-police or current, moonlighting, police officers, take satisfaction in clearing the wrongly accused. But, the real thrill has always been catching the bad guys. How then can polygraph examiners suddenly become advocates of convicted offenders -- especially those unloved and unlovable child sex abusers?

The authors consider themselves to be pragmatists. Long term imprisonment is one form of control the criminal justice system has at its disposal. We recognize that the average citizen prefers imprisonment to other alternatives, such as probation or parole. However, the average citizen is also a taxpayer who normally prefers that taxes do not be further increased. Thus, the costly facilities for long term imprisonment quickly become a scarce resource. We view the polygraph profession's expanding involvement in providing polygraph surveillance for probationers as a cost effective form of electronic control over offenders. Alternative sentencing is simply expanding the use of community collections, primarily probation by innovations that allow more social control over offenders than probation officers have been able to exercise without external help. The periodic polygraph test is an important tool of social control. The issues, in our view, are economic issues and not matters of conservative or liberal ideology. The following sections offer some background on the nature of the dilemma in corrections that suggests a need for expansion of innovative approaches in alternative sentencing. We believe that more polygraph examiners can and will come to see the need for alternative sentences and will offer their considerable experience and skill to help resolve the dilemma.

Advocating Alternative Sentencing

Prison Crowding in the United States

In the twenty years since 1972, the number of adults serving prison sentences for criminal offenses in the United States has more than doubled (American Correctional Association, 1992). The prison population now hovers above 750,000. To gain some perspective on how the United States compares with other countries in incarceration of citizens, it is useful to use a rate of people per 100,000 who are locked away. The American Correction Association (ACA) reports that this rate has reached 426 per 100,000 (On the Line, 1991). This incarceration rate is alarming to many scholars who study the criminal justice system in the United States (Austin & McVey, 1988; Morris & Tonry, 1990; Rosenfeld & Kempf, 1991). During the decade of the 1980s, there were those such as criminologist Frank Schmalleger (1991) who cautioned Americans in the mid-1980s that our incarceration rate was already the highest among Western countries and was approaching the 268 per 100,000 in the Soviet Union and 333 per 100,000 in South Africa. In some respects, the current incarceration rates have even more ominous social implications. When only black males are considered, South Africa is known to have 729 per 100,000 incarcerated, wherein the comparable rate in the United States is 3,109 out of every 100,000 black males locked up (Mauer, 1990).

The Demand For Incarceration As Humanitarianism

The use of long-term incarceration as a criminal sanction has always been expensive. The economic implications of using that type of punishment were visualized to a great extent by members of the Pennsylvania legislature in 1786 when they constructed enabling legislation to formally adopt the correctional ideology written into the state's 1776 constitution at the urging of the Philadelphia Society For Alleviating the Miseries of Public Prisons (Williams, 1979). These compassionate Quakers were following the lead established long before when William Penn was Governor of the Pennsylvania Colony. Under Penn's direction, the concept and use of incarceration as a criminal sanction to replace capital and corporal punishments slowly grew and flourished until it became, in our present generation, the most widely used response to serious felony crimes. It is evidence from the debates among these early reformers that they were aware that incarceration would be costly when compared to the standard execution and torture of criminals that was the typical response throughout their world. Yet, they believed that compassion was worth the expense and that reform of individuals was to be a logical outgrowth of thoughtful use of the new sanction.

Other than a bitter and fanatical few, Americans do not want to give up the sanction of incarceration to return to colonial methods of dealing with criminals. While capital punishment is still available as a sanction in some jurisdictions, it is evoked only rarely and usually after such self evaluation on the part of everyone involved. Long term incarceration is with us to stay for

the foreseeable future. However, it has grown to be much more costly than our forefathers could have imagined.

The Demand For Incarceration As Punishment

In the America of the 1990s, jail and prison cells have become scarce resources (Blumstein, Cohen & Miller, 1980). In a series of moves throughout the 1970s and 1980s, the federal courts have responded to inmate suits based on the "cruel and unusual punishment" provision of the Eighth Amendment. Court rulings which placed limits on the number of inmates that could be housed in existing state prisons were so common by mid-1990, that there were only four states that could say that they did not have at least one prison court order. Eleven states had all of their prisons under court-ordered admissions restrictions (American Corrections Association, 1992). The Federal Bureau of Prisons and virtually all states have aggressively built new prison capacity over the last decade to double the nation's number of prison beds. States, lacking the federal government's ability to use deficit finances, have had understandable difficulty in meeting this ever growing demand for more prison bed space. Once a new bed space is constructed at a capital cost of some \$52,000.00, occupancy of that space costs another \$15,000.00 or so per year in operating costs. Texas, which views with California and Florida for the largest prison systems, got its governor and voters to approve a \$1.1 billion prison construction bond package in September, 1991 (On the Line, 1992, p. 3). Officials in the Texas prison system have projected that the state will need to build and open one large new prison every year to keep up with the demand for prison space for as long into the future as anyone can project.

The investment in new prison plant is difficult to estimate. Eugene H. Methvin, a senior Reader's Digest editor and respected scholar of the criminal justice system, wrote a lengthy editorial in The Washington Post (reprinted in Corrections Today, February, 1992). The editorial estimates that America has spent \$30 billion in doubling the prison population capacity during the past decade. The article is controversial because Methvin argues that the increases in prison population have lowered the crime rate and that we should double it again (p. 28) to halt our long term crime wave. Steven Dillingham and Lawrence Greenfeld (1991), top executives of the score keeper: Bureau of Justice Statistics, believe that the criminal justice policies of the 1980s have reduced crime. It is not clear-cut, by any means, that increased use of prison terms is the cause of the slight reductions in crime. Researchers (Benton & Silberstein, 1983) who have examined the issue in depth have not been able to establish that there is a direct correlation between the rate of crime in some states and the prison construction program. States with fairly low crime rates have had some of the more ambitious prison building programs, while states with high crime rates may or may not respond with new prisons. Prison construction is not so much a direct response to crime rates as it is a political and moral issue.

Advocating Alternative Sentencing

The Alabama Prison System As a Representative Case

Alabama is not an atypical place to study the new move toward alternative sentencing schemes designed to help control prison population. In 1991, its adult prisons routinely held around 16,000 inmates, or about four times the number they held twenty years ago. The population then and now is at rated capacity. Twenty years ago, Alabama was under a federal court order mandating it to stop receiving sentenced felons from county jails until it created more cell space in accordance with court established standards. Alabama has rapidly built new prisons to become one of the few states in 1992 that does not have at least one institution under federal court order for crowding. Alabama citizens now fear that the federal court order will soon return. The prison population is at rated capacity (completely full) with an additional 1380 sentenced felons waiting in county jails for cell space in a state prison. The 67 county sheriffs of the state are caught in the funding crisis the state is experiencing. With their own local funding in a crisis situation, county governments have their jails full to capacity with misdemeanants serving short sentences and people who cannot make bail while awaiting trial. The state payment to counties for housing its prisoners does not help the local budgets (it is \$1.75 per day for each state prisoner housed). Tuscaloosa County, the site of the new alternative sentencing plan reported in this paper, is under federal court order limiting population in its overcrowded jail.

As of early December, 1992, the state and local tax revenue crises continues to escalate. After two years of state budget cuts necessitated by shortfalls in tax revenue, and the prospect of the shortfall worsening in the immediate future, virtually all state services are being rolled back. With \$7 million cut from his budget, the state prison commissioner announced that he would stop receiving prisoners from county jails in the spring. A federal court disagreed and the crisis for county jails was averted for the time being ("Hard Facts Hit Home on P Day," Tuscaloosa News, p. 1). However, the prison system was forced to close a 670 bed prison in Clio for lack of operating budget. The Clio prison is only two years old. The inmates being housed there were to be transferred to other prisons in the system replacing inmates due for release.

Alternative Sentencing As a Conservative Fiscal Measure

The financial crisis in state and local government services forces tough decisions to be made by the public: (1) increased taxes on one hand; or, (2) on the other hand, purchasing fewer or lower quality government services. It is not the objective of the authors to argue that we ought to accept one or the other and to inject our biases into the confusion that already exists. Rather, we prefer to examine what seems to us to be the realities of local government finance in these times.

First, Alabama voters continue to make it clear that they do not want tax increases. Where they have been given the opportunity to vote on such proposals as a modest tax increase to keep a school district afloat, these measures have been soundly defeated. State and local politicians are beginning to accept that a reduction in government services is being mandated. Government bureaucrats are attempting to cut services in ways that will have the least negative impact. The Alabama State Police, for example, have cut back on patrol and are warning motorists that it may take the state police longer than usual to respond to a call. The University of Alabama is down sizing despite continued increases in enrollment. With the state's decreasing commitment to subsidizing college education for its citizens, substantial tuition increases are shifting more of the burden to the private sector. Even so, current plans will decrease faculty size by 10 percent within two years. The remaining faculty will be huddled together in fewer departments, offering a smaller variety of degrees.

Given the twenty years of momentum that the nation's criminal justice system has achieved in building more prisons and ever increasing prison populations, it is difficult to imagine how to begin to down size a prison system. Growth of the number of convicted felons under criminal sanctions includes those who have received probation in lieu of prison and those who receive parole to leave prison before their sentence is completed. Increasing the numbers of felons diverted into probation and parole does relieve pressure on prison populations. It also provides a less costly type of sanction. Even so, Joyce Bigbee, economist for the Alabama Legislature, (Rawls, 1992) notes that the state's probation and parole officers are now attempting to supervise 150 felons each (compared to an average caseload of 91 in the Southeast). To reduce their caseload to the regional average of 91 would require hiring 141 more officers at a cost of \$4.2 million per year.

Using Advertising to Create Demand For Incarceration

In the 1970s, the Victim's Rights Movement got underway. IN the 1980s, it prospered and became a powerful and vocal lobby for more severe punishment in the form of more prison sentences (less probation) and longer times served in prison (less parole). Organizations such as Victim's of Crimen and Leniency (VOCAL) and Mothers Against Drunk Drivers (MADD) are now well organized to spend large sums of money, time and effort to influence politicians at all levels to lock up more people. Their pleas frequently fall on receptive ears since many politicians have learned that being tough on crime is a sure vote getter. Victim's rights groups help get tougher laws passed, such as life sentences for "habitual offenders", long sentences for anyone selling illegal drugs within three miles of a school, or death penalties for anyone committing a felony with a gun. Their court watching committees try to influence judges to make less use of probation, while other committees monitor parole board hearings. Contributing to the success of these "harsher penalty" movements at the grass roots is

Advocating Alternative Sentencing

the fact that hardly anyone has incentive to oppose their efforts. A few small groups do. These are mostly groups representing racial minorities who try to caution that criminal sanctions fall disproportionately on minorities (Mauer, 1990).

The Supply Side

While the demand for prison space continues to be strong in that there is no evidence that the public preference for sending large numbers of people to prison has in any way lessened, there are supply side problems. The construction index has risen substantially over the years to make the cost of adding a cell space increasingly costly. The cost of staffing prisons has risen rapidly as well. Before the period of growth started, most prison employees were low skill level blue collar workers whose talents did not demand high wages. As federal courts intervened in prison crowding and set standards for prison operation, the cost of staffing (approaching \$15,000 per inmate per year in Alabama) increased rapidly. Modern prisons employ well educated security officers and many highly trained professional staff. For a time, states were able to float bond issues to build new prisons, thereby postponing the need to pay for construction. The growing number of new prisons require staff and operation funds that has to come from current revenues. Corrections budgets have soared in recent years. Spending on corrections has been increasing at a faster pace than state spending for education or any other state service (U.S. Bureau of Justice Statistics, 1990, pp. 48-50; Petsilia, 1987, p. 2). Only a few weeks before the Alabama prison commissioner announced the closing of a large, new prison to save money, the legislature was giving serious consideration to providing a \$28 million bond issue for still another large state prison in Bibb County. The bond issue was approved despite a lack of funds in the operating budget to service the debt.

Inception of an Alternative Sentencing Program

The Tuscaloosa Alternative Sentencing Program made a modest start in April, 1991. Joe Morrison, Senior Staff Attorney of the University of Alabama Law School Clinical Program, discussed the possibility of operating such an effort as a service to the indigent through the Public Defender's Office. The Public Defender having agreed, Morrison sought, and obtained, a seed money grant from the Alabama Law Foundation. All parties agreed that the immediate goals of the project were to divert some of the indigent felons coming before the four circuit judges of Tuscaloosa's Sixth Judicial Circuit from prison in order to alleviate crowding in the local county jail as well as in the state prison system.

The temporary funding provided for three part-time employees to develop and implement the program. The Public Defender's Office agreed to provide logistical space and staff support for clerical activities. A program coordinator and two case workers were hired.

Developing Program Criteria

Defining the nature of the task at hand was a necessary, but tricky, job. Following a guilty plea or guilty verdict from a trial, the trial judge orders state probation officers assigned to the court to make a pre-sentence investigation and written report for a sentencing hearing. A probation officer will provide the judge with the detailed investigation results and a recommendation concerning whether probation is a possibility. Traditionally, either a prison sentence or probation is granted. The judge understands very well that probation officers have heavy caseloads and that probation means very little supervision.

To be a new type of intermediate sanction, an alternative sentence effort cannot focus on someone who reasonably could be expected to receive probation anyway. To be cost effective, it must focus on a person who surely will be refused probation and be sent to jail without an alternative sentencing plan to convince the judge (and the victim) that the offender can be safely supervised in the community. Selection of offenders likely to be manageable in the community and the making of a plan of supervision that goes beyond the routine interviews of a probation officer are the essence of intermediate alternative sanctions.

Mingling Ideologies: The Punitive and the Reformative

Stephen Schafer (1968), the late criminologist who spent his brilliant career in developing the theoretical concepts of victimology, often discussed ancient civilizations in which crime was a private affair between tribes or families. Restitution to the victim became a way to avoid vendettas and inter-tribal warfare (the book of Exodus outlines a fairly complex system of restitution for the followers of Moses). Schafer noted that when the nation state took over the administration of criminal justice, the victim lost the economic restitution and was left with only the psychic restitution involved in knowing that the offender was being punished. Much later, when the idea of rehabilitating offenders arose, the victims lost even their psychic satisfaction. It is not surprising then, that there is strong demand for incarceration and punishment.

Historically, probation was considered alternative sentencing; probation being conceptually an alternative to incarceration. In fact, probation with its emphasis on public censure of the offender, is merely punishment of a different sort. This has resulted in probation being characterized as enforcement of court ordered sanctions rather than a true alternative to prison. The role of the probation officer has thus become punitive and limited in that the current system mandates uniformity in its dealings with the offender. Frequently, the only recourse left open to the officer supervising an offender is a recommendation that the offender be imprisoned for what are often termed technical violations (i.e., failure to pay supervision fees, failure to

Advocating Alternative Sentencing

report to the probation officer and the like) of the probationary plan. Thus, probation can be an all or nothing proposition.

Another difficulty with the current probation scheme is that it tends to be reactive and to emphasize punishment without rehabilitation, control (e.g., random drug tests, electronic monitoring, curfews, mandatory treatment for drug and alcohol addiction) as opposed to true societal safety and uniform treatment of offenders of the same class without regard to the true nature of their offenses. The offender on probation is likely to be seen infrequently (typically once a month) and the offender is more likely to have committed an offense or a violation of his probation with such limited supervision. This is in direct contrast to an alternative sentencing arrangement which is proactive rather than reactive. Pursuant to an alternative sentencing plan, the offender is likely to be monitored to such an extent that he will be seen prior to the problem arising.

Additionally, an alternative sentencing scheme allows the sentencing authority considerable discretion in making the punishment fit the crime. For instance, alternative sentencing permits such things as confinement in a non-correctional facility, community service work, mandated support of the offender's family, the provision of direct service to the victim, and restrictions on the offender's activities and associations other than the usual restriction involving contact with other felons and the avoidance of injurious habits. Thus, alternative sentencing plans tend to be very client specific. This is in contrast to probation plans which traditionally involve little supervision and few innovative, rehabilitative aspects. Most probation plans are formulated without regard to the nature of the offense, the status of the offender, or the offender's needs.

With imprisonment, probation without much supervision, or fines as the only options, the sentencing authority had few options. Viewing these alternatives from the perspective of cost, imprisonment is extremely expensive, probation is less expensive, but still a burden on the taxpayer, and the fine is a revenue producer for the state if the offender is able to pay. From a social justice perspective, there are problems with having such limited options. In the case of a first offender, the courts have traditionally meted out a fine along with a probation plan for misdemeanors and lesser classes of felony. In such cases, the more prosperous maintain a large degree of freedom, while the poor are incarcerated in lieu of payment of the fine. This disparity of treatment between the wealthy and the economically deprived can be corrected to some degree with the flexibility inherent in alternative sentencing.

Socio-Legal Dimensions of Alternative Sentencing

Many new approaches to corrections require enabling legislation. That requirement can be a heavy burden in states where the

legislature meets infrequently. When one first considers alternative sentencing, it does not seem to require any special legislation. Most states in general, and Alabama, in particular, have traditionally provided their sentencing judges with broad discretion in imposing conditions of probation. Since probation is the legal mechanism by which alternative sentencing plans are arranged (an alternative sentencing caseworker presents a plan to the judge at a sentencing hearing of a felon who otherwise would be sent to prison), new legislation seems superfluous. However, there was some initial difficulty with these plans in Alabama.

Appellate courts usually hold that the terms and conditions of probation are within the purview of the sentencing judge and will not normally be disturbed on appeal except for a palpable abuse of discretion. However, some appellate courts have attempted to define what a permissible condition of probation might be. Florida appellate courts held that to constitute a permissible condition of probation the probationary condition must bear some relationship to the crime which was committed, and must forbid conduct that is criminal in nature or has some relationship to future criminality (Bodden v. State, 1982). In states where the appellate courts have acted to restrict the type of probation conditions that the sentencing authority can impose, the legislature can step in to restore the leeway for judges to use alternative sentences. An example of this having been done is the "Alabama Community Punishment and Corrections Act of 1991." This Act has the stated purpose of:

... promot(ing) accountability of offenders to their local community ...; provid(ing) a safe, cost-efficient, community punishment and correctional program ...; ... reduc(ing) the number of offenders committed to correctional institutions and jails by punishing such offenders in alternative punishment settings; ... provid(ing) opportunities for offenders demonstrating special needs to receive services that enhance their abilities to provide for their families and become contributing members of the community; and ... encourag(ing) the involvement of local officials and leading citizens in their local punishment and correctional system.

The Act further permits the sentencing authority to alter sentences and further requires a finding before revocation of probation that, "no measure short of confinement will adequately protect the community from further criminal activity by the offender ..."

Implementing alternative sentencing procedures addresses, to some extent, the lack of guidance in the Constitution regarding treatment of convicted offenders. Under our traditional practices, the convicted offender had no right of privacy. The Supreme Court has sanctioned unannounced searches of the convicted offender's home. With such intrusiveness possible, the usual probation

Advocating Alternative Sentencing

sanction is not attractive to offenders or to their families. The close monitoring of the offender under an alternative sentencing plan may obviate the necessity for an unannounced search of an offender's home.

Some Observations Based on Starting a New Program

The following observations may not be helpful in every jurisdiction, but most should be useful to polygraph examiners who are willing to be advocates for alternative sentencing programs.

1. Sentencing judges are willing to try alternative sentencing. They seem pleased to have some additional options.

2. Judges, court personnel and alternative sentencing case workers are willing to consider using polygraph surveillance. Most know very little about it. The examiner must be willing to explain the services that can be provided. Suggesting that the offender pay for his or her exams helps sell the idea.

3. The offenders and their defense attorneys appear willing to go to extraordinary lengths to avoid long-term incarceration -- to agree to regular drug screen procedures, to waive their rights to refuse to take a polygraph examination, to accept unusual assignments to provide restitution to victims and to engage in community service work. Once a program is underway, case workers may find that defense attorneys are eager to have their clients on the polygraph program.

4. The polygraph examiner must learn to be patient with the court system. It moves ever so slowly. Sentencing hearings are routinely delayed, canceled, and rescheduled. It can be a long time before one knows if a judge will accept a particular sentencing plan.

5. Having gotten an offender assigned to take periodic polygraph tests, the examiner must again be patient. Offenders who are meeting the conditions of their sentence do not have much money. The examiner must be flexible, because the court staff, the offender, or both may ask for a delay in a scheduled exam while the offender gathers the necessary cash.

In February, 1992, Alabama's Governor Guy Hunt gave his State of the State address. When it was time to mention the problem with prisons in the state, he stated: "... there isn't enough to put enough of the people in prison who should be there and keep them there ...". Most governors could well make the same statement (perhaps more eloquently). Alternative sentencing is a part of the answer and it represents an opportunity to use polygraph to keep the offender in the community, while keeping the community safe.

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**EMPLOYMENT REQUIREMENTS OF THE
AMERICANS WITH DISABILITIES ACT:
APPLICATION TO LAW ENFORCEMENT OFFICERS**

Prepared by

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June 1992

I. AN OVERVIEW OF TITLE I OF THE ADA

A. BASIC PROHIBITION

"No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment."

B. DEFINITIONS

1. **Qualified Individual with a Disability** means "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position ..."

2. **Disability** means having "a physical or mental impairment that substantially limits one or more of the major life activities of such individual," having a record of such impairment or being regarded as having such impairment. Current users of illegal drugs are not considered "qualified individuals with disabilities." Persons who have successfully completed a drug rehabilitation program, are participating in such program and are not using drugs, or who are otherwise successfully rehabilitated are not excluded from the definition of qualified individuals with disabilities.

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3. **Essential Functions of the Job** - Consideration will be given to the employer's judgment; a written description, prepared before advertising or interviewing applicants, will be considered evidence of the essential functions of the job.

4. **Reasonable Accommodation** includes structural modifications to provide accessibility and usability and job restructuring, modification of work schedules, providing readers or interpreters, and "other similar accommodations."

5. **Undue Hardship** - Failure to make reasonable accommodation constitutes discrimination unless such accommodation would impose an "undue hardship" on the entity. Factors used to determine existence of "undue hardship" include, among other things, the nature and cost of the necessary accommodation, the financial resources of the entity, the size of the business, type of operations, and the effect of accommodation upon operations.

C. GENERAL DEFENSE

Testing or selection criteria that are "job-related and consistent with business necessity," provided performance in the particular area cannot be accomplished by reasonable accommodations, do not constitute discrimination.

D. DIRECT THREAT TO HEALTH AND SAFETY

Qualification standards may include a requirement that an individual not pose a direct threat to the health and safety of others in the workplace.

E. MEDICAL EXAMINATIONS AND INQUIRIES

Employers may not conduct a pre-offer medical examination on applicants.

Employers may not inquire of an applicant as to whether he has a disability or as to the nature and severity thereof, but may inquire as to the ability of the applicant to perform job-related functions.

Employers may condition an offer of employment on successful completion of a medical exam if:

- 1) all entering employees are subject to such an exam;
- 2) medical information is kept confidential and in separate medical files.

F. DRUG USE AND DRUG TESTING

Drug testing is not considered a medical examination and is not prohibited by the ADA.

Employment Requirements of the ADA: Application to Law Enforcement

Current users of illegal drugs are not covered by the ADA as qualified individuals with disabilities.

G. CONTRACTUAL RELATIONSHIPS

An employer may not participate in a contractual or other arrangement or relationship that has the effect of subjecting a qualified applicant or employee with a disability to prohibited discrimination.

H. POSTING NOTICES

Employers are required to post notices concerning the provisions of the ADA. New EEOC posters which include this information are available from the EEOC (Phone 1-800-669-EEOC).

I. REMEDIES

Remedies available under Title VII apply to the ADA. These include the availability of attorneys fees and costs for prevailing plaintiff ... and to prevailing defendant if the claims were frivolous.

II. IMPLEMENTING TITLE I OF THE ADA: APPLICANT SELECTION

There are a number of steps agencies need to complete as soon as possible in order to achieve compliance with the ADA. A summary of these steps follows.

A. POSITION DESCRIPTIONS: IDENTIFY "ESSENTIAL FUNCTIONS" OF THE POSITION

The ADA (Act section 102) basically prohibits discrimination against a "qualified individual with a disability." "Qualified individual with a disability" is defined (Act section 101(8)) as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position ..." (emphasis added). The definition goes on to state that "consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job."

Although the contents of the job description are not legally entitled to greater weight than other evidence relating to job functions, failure to have such documentary evidence will increase the difficulty of defending an ADA case. One of the very first steps an employer should take toward implementing this Act is, therefore, to create position descriptions or review existing descriptions to ensure that "essential functions" are clearly identified.

Jody M. Litchford

The best methodology to follow is to complete job task analyses for each position, quantifying both the frequency and criticality of each function. Additional factors specific to each agency's operations and manpower should then be analyzed to identify the "essential functions" for each position. A function is essential to the position if removing the function would "fundamentally alter" the position (29 CFR 1630.2 (n) App.).

According to the implementing regulations (29 CFR 1730.2 (n)), a function may be classified as essential:

- (1) because the position exists to perform that function;
- (2) because of the limited number of employees available among whom the performance of that job function can be distributed; or
- (3) because of the highly specialized nature of the function.

B. DEVELOP SELECTION CRITERIA

Once the essential functions of the job are identified, some method of measuring an applicant's ability to perform each of the essential job functions (with or without reasonable accommodation) needs to be developed by the agency. Selection criteria may include medical examinations or physical standards, preferably developed in consultation with appropriate professional assistance, and/or a requirement that the applicant demonstrate his or her ability to perform essential job functions.

Technical Assistance Note:

The ADA requires an objective assessment of a particular individual's current ability to perform a job safely and effectively. Generalized "blanket" exclusions of an entire group of people with a certain disability prevent such an individual consideration. Such class-wide exclusions that do not reflect up-to-date medical knowledge and technology, or that are based on fears about future medical or workers' compensation costs, are unlikely to survive a legal challenge under the ADA. (Section 4.4).

Testing procedures themselves must not violate the Act by improperly screening out individuals with disabilities who could, with accommodation, perform the essential requirements of the job. Testing procedures need to be job related and consistent with business necessity (29 CFR 1630.10).

Employment Requirements of the ADA: Application to Law Enforcement

Selection criteria must be based on the individual's present capabilities and not on speculation that the employee may become unable to do the job in the future (29 CFR 1630.2 (m) App.).

The House and Senate Conference Committee Report indicates that "medical standards or requirements established by Federal, state, or local law, or by employers for applicants for safety or security sensitive positions", may be used as selection criteria as long as they are consistent with the ADA (Conf. Rept. at 59-60).

Technical Assistance Note:

The ADA does not override state or local laws designed to protect public health and safety, except where such laws conflict with ADA requirements. This means that if there is a state or local law that would exclude an individual with a disability for a particular job or profession because of a health or safety risk, the employer still must assess whether a particular individual would pose a "direct threat" to health or safety under the ADA standard. If there is such a "direct threat," the employer also must consider whether it could be eliminated or reduced below the level of a "direct threat" by reasonable accommodation. An employer may not rely on the existence of a state or local law that conflicts with ADA requirements as a defense to a charge of discrimination. (Section 4.6).

C. REDESIGN SELECTION PROCESS

1. Vacancy Notices

Employers are required by the ADA to provide reasonable accommodations to facilitate disabled applicants in completing pre-employment tests (unless the ability to compete the test is coextensive with the ability to perform an essential requirement of the job (29 CFR 1630.11)). An employer is generally only required to provide such accommodations if they are requested to do so in advance of the test date. If, however, a handicapped individual did not realize, prior to the administration of the test, that an accommodation would be necessary, the employer is required to schedule a re-test for the individual or provide some other effective accommodation, unless to do so would impose an undue hardship (29 CFR 1630.11 App.).

Jody M. Litchford

An employer is permitted to request, on a job announcement or application form, that individuals with disabilities who will need reasonable accommodation in order to complete a test so inform the employer within a reasonably established time frame prior to the administration of the test. Employers may also require documentation supporting the need for accommodation (20 CFR 1630.14 (a) App).

2. Applications

Employment applications should be revised to eliminate medical inquiries. Such inquiries, including those about an applicant's workers' compensation history, are prohibited by the Act, at least at the pre-offer stage of the employment process (29 CFR 1630.13 (a) App.).

3. Medical Examinations and Inquiries

1. Medical examinations and inquiries (including psychiatric evaluations) are prohibited until an offer of employment has been made to the job applicant. The offer of employment may, however, be conditioned on the results of the medical examination or inquiry. This condition is permissible only if it is applied to all entering employees in the same job category (29 CFR 1630.14).

2. Any medical criteria used to screen out prospective employees must be job related and consistent with business necessity and must relate to the applicant's ability to perform essential job functions which cannot be accomplished with reasonable accommodations (29 CFR 1630.14 (b)(3)).

4. Psychological Examinations

There is clear indication in the legislative history of the ADA that Congress intended the prohibition on pre-offer medical inquiries to preclude "psychological" inquiries as well.

Unfortunately, neither Congress nor the EEOC has, to date, provided any further guidance on the definition of "psychological" for the purposes of this prohibition. Until further guidance is available on this issue, employers utilizing any form of psychological inquiry pre-offer do so at some risk.

5. Physical Agility Tests

Physical agility tests are not medical examinations and may be given at any time during the application process, so long as they are required of all applicants. They

Employment Requirements of the ADA: Application to Law Enforcement

must be job related and consistent with business necessity. They must relate to job functions that cannot be achieved with reasonable accommodations (29 CFR 1630.14 (a) App.). Medical inquiries, often currently made preliminary to a physical agility test, are, however, precluded by the Act during the pre-offer stage of the employment process.

Technical Assistance Note:

It is important to understand the distinction between physical agility tests and prohibited pre-employment medical inquiries and examinations. One difference is that agility tests do not involve medical examinations as diagnoses by a physician, while medical examinations may involve a doctor.

For example: At the pre-offer stage, a police department may conduct an agility test to measure a candidate's ability to walk, run, jump, or lift in relation to specific job duties, but it cannot require the applicant to have a medical screening before taking the agility test. Nor can it administer a medical examination before making a conditional offer to this person.

Some employers currently may require a medical screening before administering a physical agility test to assure that the test will not harm the applicant. There are two ways that an employer can handle this problem under the ADA:

"the employer can request the applicant's physician to respond to a very restricted inquiry which describes the specific agility test and asks: 'Can this person safely perform this test?'

"the employer may administer the physical agility test after making a conditional job offer, and in this way may obtain any necessary medical information, as permitted under the ADA. ... The employer may find it more cost-efficient to administer such tests only to those candidates who have met other job qualifications. (Section 4.4).

6. Polygraph Tests

Polygraph tests are not addressed specifically in the Act. If medical inquiries are a necessary part of the polygraph testing process, this test too should be delayed until the post-offer stage. To the extent that the process itself screens out individuals with disabilities, it would be permitted under the Act only if it can be shown to be job related and consistent with business necessity.

7. Drug Tests

Drug tests are not considered to be medical examinations (Act. section 104 (d)) and may be required at any stage of the employment process. Medical information that may be obtained incidental to a drug screening must be treated as confidential.

Technical Assistance Note:

Drug tests must be conducted to detect illegal use of drugs. However, tests for illegal use of drugs also may reveal the presence of lawfully-used drugs. If a person is excluded from a job because the employer erroneously "regarded" him/her to be an addict currently using drugs illegally when a drug test revealed the presence of a lawfully prescribed drug, the employer would be liable under the ADA. To avoid such potential liability, the employer would have to determine whether the individual was using a legally prescribed drug. Because the employer may not ask what prescription drugs an individual is taking before making a conditional job offer, one way to avoid liability is to conduct drug tests after making an offer, even though such tests may be given at anytime under the ADA. (section 8.9).

Persons "currently" using illegal drugs are not considered handicapped and are not protected by the Act (Act section 104 (a)). Former drug addicts who have been "rehabilitated" do fall under the Act's protection (Act section 104 (b)). The term current drug use means "use that has occurred recently enough to indicate that the individual is actively engaged in such conduct" (29 CFR 1630.3 App.).

Employment Requirements of the ADA: Application to Law Enforcement

Technical Assistance Note:

An applicant or employee who tests positive for an illegal drug cannot immediately enter a drug rehabilitation program and seek to avoid the possibility of discipline or termination by claiming that s/he now is in rehabilitation and is no longer using drugs illegally. A person who tests positive for illegal use of drugs is not entitled to the protection that may be available to former users who have been or are in rehabilitation ... (Section 8.3).

The guidelines to the regulations implementing the Act provide that "[a]n employer, such as a law enforcement agency, may also be able to impose a qualification standard that excludes individuals with a history of illegal use of drugs if it can show that the standard is job related and consistent with business necessity." (29 CFR 1630.3 App.).

Technical Assistance Note:

An employer can fire or refuse to hire a person with a past history of illegal drug use, even if the person no longer uses drugs, in specific occupations, such as law enforcement, when an employer can show that this policy is job related and consistent with business necessity.

For example: A law enforcement agency might be able to show that excluding an individual with a history of illegal drug use from a police officer position was necessary, because such illegal conduct would undermine the credibility of the officer as a witness for the prosecution in a criminal case.

However, even in this case, exclusion of a person with a history of illegal drug use might not be justified automatically as a business necessity, if an applicant with such a history could demonstrate an extensive period of successful performance as a police officer since the time of drug use. (Section 8.7).

8. Background Investigations and Reference Checks:

Generally, employers are prohibited from indirectly seeking information about a job applicant that they could not inquire directly of the applicant. Before a condi-

Jody M. Litchford

tional offer of employment is made to an applicant, therefore, an employer cannot ask references or previous employers about the applicant's worker's compensation history, medical condition, illnesses, or disabilities. Employers may inquire about the previous employment with respect to the quality and quantity of the applicant's work performance.

Technical Assistance Note:

Information about previous work attendance records may be obtained on the application form, in the interview, or in reference checks, but the questions should not refer to illness or disability. (Section 5.5(f)).

D. DRAFT "CONDITIONAL OFFER OF EMPLOYMENT" LETTER

Assuming that the agency intends to include a medical, polygraph, and/or physical agility test as part of its post-offer employment process, a "conditional offer of employment" needs to be carefully drafted.

E. TRAINING

Training on the particulars of the ADA is essential for all employees who may interview applicants for employment. The regulations and guidelines are quite specific as to questions that may or may not be asked. In addition, the EEOC has promised to publish a compliance manual with further guidelines on pre-employment inquiries "prior to the effective date of the Act."

The basic rules are as follows:

A. Applicants may be asked about their ability to perform essential functions of the job and otherwise meet job requirements.

B. Applicants may be asked to describe or demonstrate their ability to perform essential job functions, provided that this is either: 1) required of all applicants; or 2) required of disabled applicants who have a known disability that may interfere with their performance of job-related functions.

C. Inquiries may not be made into the existence, origin, nature, severity, prognosis, or medical treatment of the disability.

Employment Requirements of the ADA: Application to Law Enforcement

III. IMPLEMENTING TITLE I OF THE ADA: GENERAL AGENCY PRACTICES

A. STORAGE OF MEDICAL INFORMATION

Information regarding medical condition or history of an applicant or employee obtained as a result of examinations or inquiries permitted by the ADA must be collected and maintained on separate forms and in separate files and treated as confidential (29 CFR 1630.14).

Release of such records or information is authorized to the following:

1. Supervisors and managers may be informed regarding necessary work restrictions or accommodations;
2. First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment;
3. Government officials investigating compliance with the ADA and similar laws;
4. State workers' compensation officers or second injury funds; and
5. Insurance companies when required for health or life insurance policies.

Technical Assistance Note:

The employer should take steps to guarantee the security of the employee's medical information, including:

"Keeping the information in a medical file in separate, locked cabinet, apart from the location of personal files; and designating a specific person or persons to have access to the medical file."

B. "FITNESS FOR DUTY" EXAMS

The Act permits employers to periodically require a medical exam or inquiry of current employees so long as such procedure is job-related and consistent with business necessity. Voluntary medical exams and activities are also permitted. In either instance, all medical information must be maintained in separate files and treated as confidential (29 CFR 1630.14 (c) and (d)).

Jody M. Litchford

Technical Assistance Note:

A police department that requires all its officers to be able to make forcible arrests and to perform all job functions in the department might be able to justify stringent physical requirements for all officers, if in fact they are required to be available for any duty in an emergency. (Section 4.4).

C. REASSIGNMENT

Current employees who become disabled are entitled to reasonable accommodation which may include reassignment to a vacant position. The employer must first determine whether the disabled employee is able to perform the essential functions of his present assignment with or without reasonable accommodation. If the employee is not so able, the employer must reassign the disabled worker to an existing vacancy with comparable pay and status if such a vacancy exists (or will exist in the immediate future) and the employee is able to perform the essential functions of the vacant position. If such a vacancy does not exist (or is not reasonably foreseen), the employer may assign the worker to a position lower in status and/or pay. In this instance, the employer need not maintain the employee's previous level of pay (29 CFR 1630.2 (m) App.).

D. BENEFITS AND PRIVILEGES OF EMPLOYMENT

The ADA requires employers to afford disabled individuals equal benefits and privileges of employment (29 CFR 1630.2 (o)). For example, employers will generally be required to provide reasonable accommodations to allow disabled workers to attend and meaningfully participate in training programs and office meetings, etc.

While employers will be required to provide insurance and similar benefits to disabled workers on the same basis as other employees, the Act does not preclude the use of pre-existing condition excluders or other coverage limitations in health care policies, so long as such clauses are not simply a subterfuge to evade the requirements of the ADA (29 CFR 1630.4 (App.)).

IV. TITLE II REQUIREMENTS

A. PROHIBITION AGAINST DISCRIMINATION

Section 202 of Title II of the ADA provides:

Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of

Employment Requirements of the ADA: Application to Law Enforcement

the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

B. DEFINITIONS

"Public entity" includes any state or local government, as well as any department, agency, special district, or instrumentality thereof. This definition includes public school systems.

"Qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

C. GENERAL REQUIREMENTS

Title II requires a public entity to make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless a public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

Title II precludes a public entity from establishing eligibility criteria that screen out, or tend to screen out, an individual with a disability unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.

D. GRIEVANCE PROCEDURES

Agencies with 50 or more employees must a) designate at least one employee to coordinate ADA responsibilities, and b) adopt and public grievance procedures for prompt resolution of complaints (28 CFR 35.107).

E. SELF EVALUATION

Agencies must complete a "self-evaluation" within one year of the effective date of Title II (January 26, 1993). Interested members of the public must be allowed to participate in this process (28 CFR 35.105).

F. NOTICE

Agencies are required to make available to "applicants, participants, beneficiaries, and other interested persons" information regarding Title II of the ADA (28 CFR 35.106).

SUMMARY

The Americans With Disabilities Act has been hailed as the most important and significant piece of civil rights legislation since 1964. It has been estimated that as many as 66% of the American workforce potentially falls within the broad protections of the Act. The EEOC has estimated that after the effective date of the Act, disability discrimination claims will constitute one-fifth to one-third of the complaints they investigate. Agencies need to act now, to avoid the onerous consequences of non-compliance with this law.

Note: Technical Assistance Notes are excerpted verbatim from the Technical Assistance Manual on Title I of the ADA, published in January, 1992, by the EEOC.

SIGNIFICANT CASES UNDER SECTION 504 OF THE
REHABILITATION ACT OF 1973

Section 501(a) of the Americans With Disabilities Act clearly states that the ADA shall be construed to provide at least as much protection to handicapped individuals as Section 504 of the Rehabilitation Act of 1973. The following Section 504 cases should, therefore, be useful in analyzing the new law.

Severino v. North Fort Myers Fire Control District, 935 F.2d 1179 (11th Cir. 1991)

HIV positive firefighter assigned to light duty, refused assignment, fired. Rehab Act claims rejected.

Butler v. Thornburg, 900 F.2d 871 (5th Cir. 1990)

The Rehabilitation Act (Sec. 501) does not prevent the FBI from firing an agent following a series of alcohol-related disciplinary incidents. The Court found that alcohol dependency would seriously compromise the agent's ability to perform his job.

Daley v. Koch, 892 F.2d 212 (2d Cir. 1989)

Police officer candidate rejected based on psychology report "poor judgment, irresponsible behavior, and poor impulse control". Not handicapped within the meaning of Rehab. Act.

Employment Requirements of the ADA: Application to Law Enforcement

Simon v. St. Louis County, 735 F.2d 1082 (8th Cir. 1984)

The Court held that police department was not required by Section 504 to reinstate a paraplegic police officer following a line-of-duty-injury. Officer was unable to perform forcible arrests -- a job requirement found to be "necessary" by the court.

Cook v. Department of Labor, 688 F.2d 669 (9th Cir. 1982)

The Court upheld termination of a corrections officer found to have angina (a symptom of coronary disease producing chest pain during times of physical and emotional stress). With this condition, corrections worker found not to be "otherwise qualified" for the position.

DiPompo v. West Point Military Academy, 708 F.Supp. 540 (S.D., N.Y. 1991)

Reading proficiency is essential element of firefighters job. Dyslexic's handicap claim rejected. (Rehab. Act).

Blissett v. City of Chicago, No. 86-C-9684 (N.D. Ill. 1990)

Chicago Police Department's policy of restricting light-duty assignments to police officers injured on-duty does not violate Section 504.

David v. Meese, 692 F.2d 505 (Pa. 1989)

FBI's refusal to hire insulin-dependent diabetic as special agent or investigative specialist held not to violate Section 504. Applicant not otherwise qualified to perform essential requirements of position. No accommodation possible without fundamentally altering job description.

Trembczynski v. City of Calumet City, No. 87-C-0961 (N.D. Ill. 1987)

Police Department's requirement that new officers have vision better than 20/30 uncorrected held not to violate Section 504 since these Plaintiff's vision, although worse than 20/30, did not interfere with their ability to engage in life's major activities (hence, Plaintiffs were not "handicapped" within the definition of the act).

Jody M. Litchford

Mahoney v. Ortiz, 546 F.Supp. 22 (S.D. New York 1986)

Upheld entry medical standard for police officers that automatically excluded individuals who had suffered two or more dislocations of the same shoulder, based on a 10-15% risk of re-injury, ultimately endangering the officer or others.

Johnson v. Smith, 39 F.E.P. Cases 1106 (D. Minn. 1985)

Corrections officer denied employment because of history of drug and alcohol abuse existing more than six years previous to his present application made out a prima facie case under Section 504.

Huff v. Israel, 573 F.Supp. 107 (M.D. Ga. 1983)

A municipal compliance officer, whose job involved enforcing city, state, and federal laws, can be discharged for his third DUI conviction. Section 504 not violated insofar as his discharge was based on his failure to comply with the law, not on his alcoholism.

Duran v. City of Tampa, 451 F.Supp. 954 (M.D. FL. 1978)

Exclusion of all applicants for police officer position who had any history of epilepsy, held to violate Section 504.

Desper v. Montgomery County, 727 F.Supp. 959 (E.D. Pa. 1990)

Narcotics officers who used drugs and suffered from stress not otherwise qualified under Section 504.

Copeland v. Philadelphia Police Department, 840 F.2d 1139 (3d Cir. 1988)

Officer who tested positive for marijuana use on urinalysis not "otherwise qualified" pursuant to Section 504.

Heron v. McGuire, 803 F.2d 67 (2d Cir. 1986)

Heroin addict not "otherwise qualified" for law enforcement position.

Davis v. Bucher, 451 F.Supp. 791 (E.D. Pa. 1978)

Hiring practice of City of Philadelphia, disqualifying applicants for any municipal position who had histories of drug abuse, held to violate Section 504.

NEW APPROACH TO INTERVIEWING CHILDREN:
A TEST OF ITS EFFECTIVENESS

Introduction

by

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Issues involving child witnesses are currently significant in appellate law. In the last 2 years or so, the United States Supreme Court has heard, or agreed to hear, at least three child-witness cases. The decision in one of them turned on the question of whether out-of-court statements made by a young child were reliable--an issue at least indirectly addressed by the research summarized in this Research in Brief.

The need has never been greater to learn what works and why. The research reported in this Research in Brief on the cognitive interview procedure goes a long way toward meeting that need. Cases involving children are no exception to the maxim that information is the lifeblood of criminal investigation and prosecution. The ability to obtain useful information from child victims or witnesses is often crucial.

Yet even experienced investigators or district attorneys may not be familiar with new developments in interviewing. Or if they are, they may not be using them as effectively as they might; the present research documents one such instance. The cognitive interview procedure is easy to learn and to incorporate into the investigative routines of law enforcement agencies and prosecutors' offices. According to the research reported here, the procedure holds great promise in enhancing the completeness and accuracy of information obtained from children. In so doing, the cognitive interview could remove many of the legal and other challenges to statements elicited from child victims or witnesses.

Reprinted with permission of the National Institute of Justice. Previously published as a NIJ Research in Brief, May 1992. A note to that brief states that the Brief summarized findings of a study conducted by R. Edward Geiselman and Gail Bornstein of the University of California, Los Angeles, and Karen J. Saywitz of Harbor-UCLA Medical Center. Their study was conducted under Grant No. 88-IJ-CX-0033 from the National Institute of Justice, U.S. Department of Justice.

The Study

Investigators, prosecutors, defense attorneys, judges--all have voiced concern about the accuracy, completeness, and other aspects of information derived from interviews with children who are victims of, or witnesses to, alleged crimes.

The National Institute of Justice (NIJ) is acutely aware of those specific concerns as well as issues pertaining to victims and witnesses generally. From its earliest years, NIJ has funded research focusing on maximizing the helpfulness of victims and witnesses to the criminal justice process, while minimizing the inconvenience, discomfort, and stress they can experience while offering that help.

In the mid-1980's, an NIJ Research in Action[1] noted that child victims were viewed by some as incompetent, unreliable, or not credible as witnesses. That NIJ-funded research noted the need to identify the best techniques for conducting interviews of child victims to obtain the most reliable information.

Within months after that research was published, another NIJ-funded study reported the development of a promising memory-retrieval procedure for interviewing adult witnesses, the cognitive interview (so named because its techniques are borrowed from research in cognitive psychology). Researchers found that use of the procedure increased the amount of correct information obtained from a wide range of eyewitnesses without producing a higher percentage of inaccurate information.[2]

Could a version of the cognitive interview procedure for use with child victims and witnesses prove effective in terms of enhancing the completeness and accuracy of their information? NIJ awarded a grant to R. Edward Geiselman, Gail Bornstein, and Karen J. Saywitz of the University of California, Los Angeles, to address that and related questions. Their study, summarized here, presents a highly positive picture of the interviewing procedure.

That has major implications. For instance, the extent to which a child's information is complete is likely to affect not only the success of investigations but also jurors' perceptions of the credibility of the child as a witness. As for accuracy, correct information minimizes false leads that may waste valuable time and talent of investigators and, more important, may preclude a miscarriage of justice.

The primary purpose of the NIJ study was to evaluate the effect of a practice interview (about a nonrelated staged incident) on children's recall performance during a subsequent cognitive interview about an event under investigation.

New Approach to Interviewing Children

Also, the researchers evaluated the impact on children's recall performances of child-oriented modifications they had made to all components of the cognitive interview procedure--with a sample of children different from that used in previous studies. This evaluation included assessments of the effect of various memory-jogging techniques, interviewers' styles, and children's ages on recall ability.

Basics of the Cognitive Interview

The cognitive interview is a three-phase procedure. The first focuses on developing rapport between interviewer and child and on setting the ground rules for subsequent questioning. Phase 2 involves techniques designed to elicit from the child as complete a narrative account or report of the alleged crime as possible.

The objective of the methods used in phase 3 is to encourage the child to clarify and expand upon what was reported in the narrative account. The interviewer probes for specifics that the child knows but may not have included in the narrative report.

Outlined below are the components (listed in the sequence used by the children's interviewers) of each phase of the cognitive interview.

Cognitive Interview Components

Phase 1

- * Develop rapport with the child in accordance with recommended guidelines.

- * Prepare child for the interviewer's questions through a set of four instructions.

Phase 2

- * Ask the child to reconstruct, aloud, the circumstances surrounding the incident. That includes not only such external factors as the appearance of the scene, the people present or nearby, and the weather but also the child's thoughts and feelings at the time.

- * Instruct the child to report every thing that happened from beginning to end, including what may not seem important.

Phase 3

- * Ask the child to recall events in backward order, from the end of the incident to the beginning.

- * Use the memory-jogging techniques of asking the child to run through the alphabet as an aid to identifying the first letter

of a forgotten name; to reflect on whether the suspect's appearance reminded the child of someone else; to recall unusual speech characteristics; and to remember conversations, unusual words or phrases, and reactions to them.

* Ask the child to recount the incident from a different perspective, such as through the eyes of someone else who was present, or through the "eyes" of an inanimate object, such as a stuffed animal that was present.

The Study's Method

Thirty-four third-graders between the ages of 8 and 9 and 58 sixth-graders between the ages of 11 and 12 witnessed two staged events and were interviewed about each. Advanced undergraduate psychology majors conducted "practice interviews" for a staged event similar to one that would be staged for practice-interview purposes under real-life conditions.

Sheriff's deputies interviewed the children ("target interviews") about another staged event, which was the study's stand-in for an incident under actual investigation.

Exhibits 1 and 2 present additional information about the practice interview, target interview, and the staged events.

The researchers introduced the practice interview to test its potential for having a positive impact on the effectiveness of the subsequent target interview by familiarizing the child with the interview process. That could result if the practice interview increased the chances of identifying and correcting the child's misconceptions about the interview procedure, enhanced a willingness to speak freely, and reduced feelings of anxiety.

As explained in exhibits 1 and 2, interviewers conducted two types of practice interview and two types of target interview. An assigned letter labeled each type (C for cognitive interview; R for rapport development only; and S for standard interview).

Researchers randomly assigned each child to one of three practice-target interview combinations: CC, RC, and RS (the first letter of each combination refers to the practice-interview type, the second to the target-interview type).

Comparing target-interview results of the RC and RS combinations permitted assessment of how the target cognitive-interview approach fared against the target standard interview. Analysis of the target-interview results of the CC and RC combinations provided an assessment of whether the practice cognitive interview enhanced the children's performance during the target cognitive interview.

New Approach to Interviewing Children

Exhibit 1

Practice Interview About the Waiting-Room Staged Event

The staged event

Following the staged event described in Exhibit 2, an adult escorted third- and sixth-graders to a waiting room and left. After a brief delay, a male portraying a "surfer dude" entered. He told the children that his name was Andrew and that he was waiting for Mr. Henderson. Andrew asked the children whether he could wait for Mr. Henderson but departed after about 5 minutes. This incident, staged at a location on the UCLA campus, was rich in details about persons, objects, and events.

The interviewers

Immediately following the waiting-room event, advanced undergraduate psychology majors from the University of California, Los Angeles, interviewed each child, one on one, at a UCLA location different from that of the staged event. The interviewers were provided with a script of the waiting room incident in advance, so that they could "challenge" a child who had given incorrect information.

The interview: two types

Each interviewer conducted two types of practice interview. For each child, the interviewer only developed rapport; for others, the interviewer conducted the full cognitive interview. The study labeled the rapport-only practice interview as "R" practice interview and the full cognitive interview as a "C" practice interview.

Exhibit 2

Target Interview About the Slide-Show Staged Event

The staged event

A female, playing the role of a teacher, showed slides of California landmarks to third- and sixth-graders, in groups of three or four at a location on the UCLA campus. After she presented seven slides and short stories about the landmarks, a male entered the room, waved a stick, threw down his backpack, and created sufficient commotion to gain the children's attention.

The interviewers

Two days after the children witnessed the slide-show incident, deputies from the Los Angeles County Sheriff's Department interviewed them, one on one. Volunteering to participate in the study,

each deputy had completed formal training given by the Sheriff's Department on interviewing child witnesses and victims. Each had at least 4 years' experience in the field. All were provided written instructions on how to conduct the type of interview assigned, and all but one attended a 2-hour training session conducted by the researchers.

The interview: two types

Each deputy, as randomly assigned, conducted one of two types of target interview: cognitive or standard. The study labeled the cognitive interview as a "C" target interview and the standard interview as an "S" target interview. (Written instructions on how to conduct the type of interview assigned were sent to each deputy. Additionally, the researchers presented a 2-hour training session.)

Guidelines for Interviewers

The researchers provided interviewers with guidelines tailored to the type of practice or target interview to be conducted--cognitive, standard, or rapport development only.

Rapport development. All interviews began with the development of rapport with the child. Guidelines included the following:

- * Do not begin by asking the child for his or her name. Greet the child by saying, "You must be Mary? My name is Bob."

- * Follow the greeting by asking simple questions about the child's world and provide some personal information about yourself.

- * Do not ask questions that could be regarded as coercive, such as "Do you want to be my friend?" Use positive, open-ended questions, which are likely to promote expanded conversation: "What are your favorite TV shows?"

- * Do not be overly patronizing, such as by making the child feel pressured to "be your friend."

- * Empathize with a nervous child's feelings. Indicate the naturalness of such feelings: "I wonder whether it feels scary to talk to a stranger about stuff that is so hard to talk about."

Interview preparation instructions.

Interviewers scheduled to conduct a practice or target interview of the cognitive type or a target interview of the standard type followed rapport development with preparation of the child for the upcoming questions by instructing the interviewee as follows:

New Approach to Interviewing Children

* "There may be some questions that you do not know the answers to. That's okay. Nobody can remember everything. If you don't know the answer to a question, then tell me 'I don't know,' but do not guess or make anything up. It is very important to tell me only what you really remember. Only what really happened."

* "If you do not want to answer some of the questions, you don't have to. That's okay. Tell me 'I don't want to answer that question.'"

* "If you do not know what something I ask you means, tell me 'I don't know what you mean.' Tell me to say it in new words."

* "I may ask you some questions more than one time. Sometimes I forget that I already asked you that question. You don't have to change your answer. Just tell me what you remember the best you can."

Narrative report.

Interviewers scheduled to conduct a practice or target interview of the cognitive type or a target interview of the standard type continued the interview by asking the child for a narrative account of "what happened."

Narrative report: Cognitive interview only.

Before asking, those conducting cognitive sessions asked the child to reconstruct the circumstances surrounding the event witnessed and to be complete.

Reconstruct the circumstances. Guidelines for the interviewers stated that the child's reconstruction of the circumstances surrounding the incident should include not only external factors but also his or her feelings at the time. That should be done aloud to ensure that the child will expend the necessary mental effort and will understand what is expected. To keep the child grounded in reality and minimize fantasy, the guidelines state that the interviewer must avoid using such terms as "pretend" and "imagine."

The interviewer's guidelines recommended that the child be told the following: "Picture that time when [insert here the appropriate lead-in information], as if you were there right now. Think about what it was like there. Tell me out loud. Were there any smells there? Was it dark or light? Picture any people who were there. Who else was there? What things were there? How were you feeling when you were there?"

Be complete/report everything. According to the researchers' guidelines, after the child reconstructs the circumstances, interviewers are to instruct the child as follows:

"Now I want you to start at the beginning and tell me what happened, from the beginning to the middle, to the end. Tell me everything you remember, even little parts that you don't think are very important. Sometimes people leave out little things because they think little things are not important. Tell me everything that happened."

The guidelines include several caveats and suggestions. Do not interrupt while the child is talking. To do so risks foreshortening the child's narrative report and exposing it to legal complications based on "leading" the witness. If needed, prompting in a neutral way is all right: "And then what happened?" Take notes sparingly, ask for clarification when the child is finished. Use a tape recorder. Speak slowly so the child will do so also.

Specific questions phase.

Those conducting a practice or target interview of the cognitive type or a target interview of the standard type are to encourage the children to expand upon or clarify what is reported in the narrative account. Guidelines for all such interviews included such advice as the following:

- * Ask open-ended questions whenever possible: "Can you tell me about the clothes that the man was wearing?"

- * Permit the child to answer one question before posing another.

- * Speak in a relaxed tone and keep language simple. Use positive phrasing: "Do you remember the color of the car?" Not, "You don't remember the color of the car, do you?"

- * Pay attention to the child's answers to your questions and do not jump to conclusions about the reliability of the child as a witness.

- * Praise the child's effort, not the content of the responses.

Specific questions phase: Cognitive interview only.

Researchers prepared additional guidelines about the use of special memory-jogging techniques, highlighted below, for only those who conducted practice or target interviews of the cognitive type.

Backward-order recall. Guidelines said that interviewers should ask the children to recall the events in backward order, starting at the end, then the middle, and then the beginning. Prepare the child for that technique before asking backward-order questions. After each response, prompt the child: "What happened right before that?"

New Approach to Interviewing Children

Alphabet search. If the child believes that a name may have been mentioned during the incident witnessed, ask the child to go through the alphabet as an aid to recalling the first letter of the name.

Speech characteristics. Probe for speech traits. Did a voice remind the child of another's? If so, why and what was unusual about the voice?

Conversation. How did the child feel about what was said? Unusual words or phrases?

New perspective. Guidelines informed interviewers to ask each child to recall the incident from the perspective of someone else present at the event: "Put yourself in the body of _____, and tell me what you would have seen or heard if you had been that person?" A further recommendation: use that technique only after the child appears to have exhausted his or her memory of the event.

In actual cases it might be upsetting for children to report the event from the viewpoint of the alleged perpetrator. In such cases, the perspectives of other victims or even a stuffed animal may not carry similar emotional overtones that could influence reporting.

Results of the Study

Transcripts of the deputies' sessions with the children yielded sufficient information on which to base an assessment--from a number of standpoints--of the effectiveness of the various types of interviews and related techniques.

As a general observation, Geiselman, Bornstein, and Saywitz concluded that variations either in the number of questions asked during the various types of interviews or in the length of the interviews are irrelevant to an explanation of the effects of using either the practice interview or the cognitive-interview procedure.

Number of facts recalled correctly.

When children received rapport development only in the practice interview and then were interviewed by deputies using the cognitive interview procedure, the children recalled correctly 18 percent more facts than did the children receiving the standard interview from deputies after a rapport development practice interview. The improvement was 45 percent when the children's practice interview was of the cognitive type. Those percentages probably underestimate the potential of the cognitive interview inasmuch as many deputies, as noted later, did not use all the techniques that make up the cognitive interview procedure.

The older children correctly recalled significantly more facts than the younger children.

Number of recall errors.

Statistically, third-graders in this study did not make more recall errors than sixth-graders. This finding, the researchers say, has far-reaching implications for the evaluation of testimony by children in different age ranges. Additionally, the differences in incorrect items recall among the interview format conditions were not significant.

Accuracy of recall.

The accuracy rate of the children's recall (number of instances of accurate recall divided by all recall instances) during interviews with deputies was remarkably high for each practice-target interview combination:

RC	Practice - Rapport only
	Target - Cognitive
	89 percent accuracy
CC	Practice - Cognitive
	Target - Cognitive
	88 percent accuracy
RS	Practice - Rapport only
	Target - Standard
	84 percent accuracy

Such rates provide another illustration of the recollection capability of young children who are interviewed by experienced law enforcement personnel, state the researchers.

Assessment of four cognitive techniques.

Deputies used each of the four cognitive techniques much less frequently than did the student interviewers. For example, most of the deputies assigned to conduct one set of cognitive interviews did not use all four techniques, whereas 5 percent of the students assigned to conduct full cognitive interviews failed to use each of the four.

Use of the reconstruction-of-circumstances technique was significantly associated with the number of correctly recalled facts during the deputies' cognitive interviews. So also was use of the be-complete technique, which was not associated with an increase in the number of items recalled incorrectly.

When interviewers used the backward-order technique, it elicited new information 44 percent of the time, 79 percent of which was correct. Use of the new-perspective technique generated new information 75 percent of the time, 86 percent being accurate.

New Approach to Interviewing Children

Interviewing style and children's performance.

The researchers characterized interviews as ambivalent (31 percent), condescending (38 percent), or positive (31 percent). Each style affected the recall performance of children differently.

Ambivalent interviewers were described as bored and disinterested--as if their primary concern was to complete the interview, not to gather complete and accurate information. Their interviews usually lasted only 10 minutes, less than half the average time computed for all interviews. Often, they asked three or more sometimes-leading questions at once: "Did he have any hair on his face or jewelry? Did he have earrings like you or a beard or a mustache, or you don't remember?" In such interviews little time was spent developing rapport with the child.

Ambivalent interviewers were the least productive, asking the fewest questions and eliciting the smallest number of informational items (correct or incorrect) from the children.

Condescending interviewers appeared to convey that they did not have faith in the children's responses: "You say his name is David. Are you sure his name is David? How do you know his name is David?" Such interviewers also frequently repeated questions, posed questions in rapid-fire fashion, and foreshortened responses by interrupting the child.

Compared to the other two types of interviewers, the condescending interviewer asked the most questions (87.6 more than twice as many, on average, as the ambivalent questioner) and generated more information than did the ambivalent interviewer but at the cost of eliciting more incorrect information.

Positive interviewers appeared to develop rapport effectively, showed interest in what children were saying, maintained a high level of attention, praised children for their efforts, and generated expanded responses through open-ended questions.

Positive interviews produced the most information and the highest accuracy rate (90.1 percent). Compared to the condescending interviewer, for example, those using the positive approach asked fewer questions and generated more information without an increase in errors.

Conclusions and implications

Practice interviews.

The impact of a practice cognitive interview about an innocuous event on a child's recall performance during a later, official interview is indeed beneficial. Practice interviews can serve one or more of these purposes.

- * Give the child experience with the usually unfamiliar task of being interviewed by a stranger about details of an event.

- * Clarify the methods used in a subsequent interview.

- * Encourage the child to use recall techniques spontaneously so that more of them will be employed.

At first glance, the recommendation in favor of practice interviewing creates a dilemma. Others have emphasized that victims and witnesses of child abuse must undergo several interviews about the alleged crime; that paves the way for numerous psychological and legal complications. One might regard the practice interview as yet another in an already too-long series of interviews.

However, if the child provides a more complete report early in the process because of more effective interview techniques, the overall time required for interviewing the child should be less.

The NIJ study documents that children who experienced a practice cognitive interview about an unrelated event gave the most complete reports about the target event. Children who are victims and witnesses could undergo a practice interview without the need to retell frightening or anxiety-producing experiences as many times as are currently customary or required. Thus, the practice interview seems well worth the minimal time and expense to implement, conclude the researchers.

Cognitive interviews.

With or without a practice cognitive interview, cognitive interviewing significantly improved children's recall performance, particularly for the sixth-graders. (Third-graders also displayed a significant increase in correct recall, but the effects were less pronounced.)

Furthermore, the increase in correctly recalled information did not entail the cost of an increase in the amount of incorrect information generated.

Training.

To be most effective, the study indicates, all four techniques associated with the cognitive interview procedure should be used at least once, and a positive style of interviewing should be followed. Deputies conducting the target interviews included all four cognitive techniques (reconstruct circumstances, be complete, backward order, and new perspective) less frequently than did student interviewers conducting the practice sessions. Only about one-third of the deputies employed the positive interviewing approach.

New Approach to Interviewing Children

To produce interviewers who are reliably effective in questioning children, more individualized training is required, the researchers conclude. They suggest an approach that includes in the training regimen an individualized role-playing exercise, which could be videotaped and critiqued by personnel proficient in cognitive interviewing.

Notes

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[2] Geiselman, R.E., and Fisher, R.P. (1985). "Interviewing Victims and Witnesses of Crime." National Institute of Justice Research in Brief.

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REVIEW OF POLYGRAPH CASE LAW FOR

1992 - 1993

By

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This review and the abstracts represent only that portion of the appeal and decision that relate to the polygraph issues. In most cases there were other matters on appeal. Also, as these are abstracts, they should not be relied upon as anything more than a guide, and the original citation should be consulted. The West Reporters for Federal, Federal Supplement and the geographical areas were reviewed for the period up to the issues of April 20th to May 7th 1993. The renewed Mississippi licensing law is appended to this review. All but three U.S. district court cases are appellate decisions, and one ten-year-old Texas case is included at the request of an APA member.

REVIEW

In Federal cases, the Second Circuit saw no abuse in discretion on the part of a trial judge that held results of an ex parte polygraph examination were inadmissible. A U.S. District Court in Texas granted summary judgment for the defendants when a discharged police officer sued, saying he should not have been fired for refusing a polygraph examination ordered by the Chief of Police of Laredo. The 700 pounds of marijuana in the officer's home might have had an influence on the decision, but that is pure speculation. A U.S. District Court in Ohio was asked by an indigent defendant for money to take a polygraph examination, with the results protected by the attorney-client relationship, and released only if counsel saw fit to do so. The court did not find the services requested to be necessary. Although in the Sixth Circuit, the federal trial court in Ohio used a Seventh Circuit precedent on the same point. The Eighth Circuit considered a habeas corpus relief request based on ineffective assistance of counsel in which counsel failed to get a written agreement supporting stipulated admissibility of a polygraph examination of the defendant. Arkansas law is clear on the requirement for the stipulation to be in writing. The Circuit court affirmed a district court's denial of relief, but upon dissent of one of the judges, ordered a hearing en banc. A Kansas prisoner sought habeas corpus relief claiming an unfair trial in which the prosecutor's question to a defense

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Norman Ansley

witness asked about the witness' failure to pass a polygraph examination. The Court said his trial was not so unfair that his rights were denied.

In California the state supreme court considered a trial court's denial of a motion to admit results of a police polygraph test of a witness which indicated deception. The appellate decision upheld the trial court's action saying that the prosecution had a duty to inform the defense of the polygraph results, but that did not make the results admissible, because the test results are not generally accepted as reliable in the scientific community. The state supreme court also said, in another opinion, that willingness to take a polygraph examination is not admissible as evidence, a fact well established in the state case law and the evidence code.

The Connecticut supreme court said that a trial court's exclusion of the polygraph test results of a defense witness was proper, as such evidence is inadmissible.

Ruling on a juvenile case, the Delaware supreme court said it was improper for a judge to suggest to the defendant that he take a polygraph test, with the implication that he would be found guilty if he did not.

The Georgia Court of Appeals ruled on three polygraph cases. In the first the court held that the defendant could not expect to enter polygraph results at trial when he had refused to stipulate to admissibility before the test was given. In the second case the defendant first had a private examination then offered to stipulate to admissibility of a state administered test. The second test was not given, and the results of the first test were held inadmissible. The third case is unusual. In an unstipulated polygraph examination, the defendant made inculpatory statements in the pre-test and post-test phases of the examination. The appellate court decided that since results of an unstipulated examination are not admissible, and since an examination includes the pre-test and post-test phases, the statements should not have been admitted at trial. Concurring, two justices noted that the defendant's counsel told him before the examination that since the test was unstipulated, anything he said would be inadmissible.

The Illinois supreme court decided that a defendant didn't get a fair trial because he was prevented from mentioning his polygraph examination in cross-examining the witness, who was the polygraph examiner. In ordering the new trial the court said that trial ruling deprived him of a right to present a defense, although normally mention of polygraph is taboo in Illinois courts. An Illinois appellate court said a trial court erred in allowing mention of polygraph tests during trial for arson. The court said the mention of the defendant's examination was plain error, but the same rules do not apply to mention of tests of witnesses, although that too might be error. Altogether, not enough to merit a new

Review of Polygraph Case Law for 1992-1992

trial in this case. An Illinois appellate court considered an appeal from a school district in which a hearing officer ordered reinstatement of a teacher, saying the school district had not proven its case [that the teacher had fathered a junior high school student's child]. The evidence included a polygraph examination which indicated the student, after some admissions, was telling the truth when she said the teacher fathered her child. That evidence was considered but so was other contrary evidence. The appellate court declined to overturn the decision. An Illinois appellate court considered the claim of double jeopardy when the first trial was stopped after a defense witness mentioned taking a lie detector test. A mistrial at the request of the prosecution was granted. Not double jeopardy, said the appellate court, as there was no judicial or prosecutorial misconduct.

The supreme court of Indiana made short work of an appeal in which the defendant complained of the admission of polygraph test results from a stipulated examination. The Court said, "It is the prerogative of the accused to take a polygraph examination. When an accused executes a waiver, he cannot then complain that the State has violated his rights against self-incrimination." However, the supreme court reversed and remanded for a new trial a case in which the prosecution mentioned a polygraph examination during the explanation of the plea agreement with their chief witness.

In Louisiana a court of appeals held that a brief, unsolicited mention of a polygraph examination that was not given, was not erroneous.

In Maryland, the supreme court of the state considered a case in which inadvertent mention of the word "polygraph" occurred twice, but in reference to a room, not a test. The trial judge denied a mistrial and the appellate court concurred. The supreme court of Maryland, titled the Court of Appeals, did not rule on the issue, but for other reasons reversed and vacated the judgment on the accessory after the fact conviction, but affirmed the conviction for murder. In another case, Maryland's highest court held that the results of polygraph examinations were discoverable as scientific tests within the meaning of a state evidence rule, and ordered the trial court to hold a hearing as to whether the withholding of the evidence from the defense was prejudicial. Polygraph results are inadmissible in Maryland.

In Massachusetts the Supreme Court said that denial of the defendant's request for a polygraph test, with results admitted, was correct, as such results are inadmissible.

A Missouri appellate court considered an appeal in which the defendant's polygraph results were held inadmissible. No error said the court.

Norman Ansley

In Nevada, the defendant was convicted of murder and his three statements were admitted into evidence, even though they contained several statements by the defendant that he would be willing to take a polygraph test. The Nevada Supreme Court found no error, as the statements did not prejudice the defendant, even though such statements are normally inadmissible.

An Ohio police dispatcher, fired for refusing the Chief's order to take a polygraph examination, sought unemployment benefits. The Supreme Court of Ohio found the refusal just cause for discharge, and disqualified the dispatcher from compensation. An Ohio appellate court reversed and remanded for retrial a case in which the prosecution, over objection, got into evidence the results of urinalysis and polygraph tests of a key witness. In another case lacking pretrial stipulation, an appellate court reversed and remanded for retrial a case in which the polygraph test results of a co-defendant were admitted. In a murder case, the Ohio Supreme Court held it was not error for the prosecution to admit the results of a polygraph examination of the victim, as the defendant knew the results indicated her late husband had not molested her daughter, and the testimony about the test was relevant to rebut, in part, her claim of self defense.

The Oklahoma Court of Criminal Appeals did not find it improper for the defendant's grant of immunity to require that he pass a polygraph test. There was no immunity since he did not answer the questions truthfully, a conclusion based on the examiner's testimony.

A Pennsylvania appellate court said it was not reversible error when the witness inadvertently mentioned a polygraph test, and the judge ordered it struck and instructed the jury to ignore it. A Pennsylvania court of appeals, en banc, ruled that when a police detective promised the defendant's attorney that charges would be dropped if defendant passed a polygraph test, he legally bound the state to do so. The defendant passed the test, but the state prosecuted anyway because the eleven-year-old victim also passed a polygraph test. Here, the court found there was no meeting of the minds on the agreement and, therefore, it could not be enforced. Reversed and remanded for retrial for an unrelated reason, one judge dissented, saying estoppel theory should have been applied here, and the defendant released.

In Texas, the Court of Criminal Appeals said there was no error when the defendant's confession followed a polygraph examination. The defendant did not appeal the frequent mention of the polygraph test during trial, but did appeal the use of photographs of the deceased by the examiner before he confessed. No error there, either. A Texas appellate court held it reversible error for the prosecution to call a rebuttal witness and ask if he had agreed to take a polygraph test. Even without an answer, the error impermissibly bolstered the credibility of the witness.

Review of Polygraph Case Law for 1992-1992

In Virginia an appellate court said it was not error to admit into evidence the entire, unedited recorded conversation between the defendant and police officers even though it included several statements by the defendant that he was willing to take a lie detector test. Although not normally admissible, here the statements did not harm the defendant, and to have edited out the offers would have destroyed the continuity of the recording.

ABSTRACTS

Second Circuit

United States v. Rea, 958 F.2d 1206 (2nd Cir. 1992)

Defendants were convicted of defrauding the United States and of federal tax evasion, and they appealed.

Rea contended the trial court erred in denying his motion for an in limine ruling permitting him to introduce at trial the results of a polygraph examination to which he had voluntarily submitted. The district court stated it was not prepared to disregard Second Circuit authority that it did not believe polygraph tests were sufficiently reliable to warrant admission of results in evidence.

The Second Circuit said they saw no abuse of discretion in the ruling; and added that even assuming such tests were not per se inadmissible, the record did not indicate Rea's test was sufficiently reliable or sufficiently relevant to warrant admission.

Conviction affirmed.

Fifth Circuit

Soto v. City of Laredo, 764 F.Supp. 448 and 764 F.Supp. 454 (S.D. Tex 1991)

A search of a police officer's home, which he shared with other family members, discovered 700 pounds of marijuana. He was arrested, suspended, then discharged. He then brought action against the City of Laredo, the police chief and the arresting officer. The City moved for summary judgment, which was granted in part. One issue was whether Soto could be suspended or terminated for refusing to submit to a polygraph test.

The Court granted summary judgment for the defendants on all issues. In reference to the polygraph issue, the United States District Court, S.D. Texas, Laredo Division, said, "Chief Johnson did not violate state or federal law by terminating Soto's employment for refusing participation in a lie detector test."

Sixth Circuit

In Re Grand Jury Investigation (Application of Lori Kaps-Eisenagle), 791 F.Supp. 192 (S.D. Ohio 1992)

Indigent subject of a grand jury narcotics investigation applied for payment authorization under the Criminal Justice Act for a polygraph examination.

The U.S. District Court said they were perplexed at the unusual request where counsel seemingly wanted to establish his client's veracity through a polygraph examination to bolster his attorney-client relationship with her and to enhance the representation she was to receive. Counsel also said he might reveal the results of any such polygraph test to the government in an attempt to avoid indictment. But he also noted that the results would be protected by the attorney-client privilege.

The U.S. District Court took note of the fact that polygraph tests have been found admissible in the grand jury process in United States v. Callahan, 442 F.Supp. 1213 (D.C. Minn. 1978), reversed on other grounds, 596 F.2d 759 (8th Cir. 1979) and United States v. Narciso, 446 F.Supp. 252 (D.C. Mich. 1977). The Court said there is no guarantee here that if a polygraph report was available that it would be introduced by the Assistant U.S. Attorney to the grand jury. The Court observed that while admissibility of polygraph results lies fully within the discretion of the court, the overwhelming weight of Sixth Circuit decisions has been against admissibility, most recently United States v. Barger, 391 F.2d 931 (6th Cir. 1991). The Seventh Circuit in a case more to the point found no abuse of discretion of the trial court when it denied funds for a polygraph test where defendant did not claim the results of the test would be admitted into evidence, United States v. Penick, 496 F.2d 1105 (7th Cir. 1974). Based on that case the U.S.D.C. did not find the services requested were necessary, and denied the request.

Eighth Circuit

Houston v. Lockhart, 958 F.2d 826 (8th Cir. 1992)

Defendant sought habeas corpus relief after the Arkansas Supreme Court affirmed his conviction for rape of his 12-year-old daughter by deviate sexual behavior, 739 S.W.2d 154, 293 Ark. 492. The U.S. District Court denied habeas corpus relief and appeal was taken. Defendant claimed ineffective assistance of counsel because counsel did not secure from the prosecution a written stipulation to admit certain polygraph test results into evidence at trial, and then counsel failed to pursue the issue on appeal.

The Arkansas Supreme Court has held that polygraph test results are admissible only if both parties agree in writing to the

Review of Polygraph Case Law for 1992-1992

admission. Houston v. State, No. CR87-85, Slip op at 1, 1988 WL 14152 (Ark. Feb. 22, 1988). As no such agreement was made, the test results were inadmissible, making an objection by defense futile. The Arkansas rule on stipulations relating to polygraph tests is clear, Foster v. State, 687 S.W.2d 829, 285 Ark. 363, cert. denied 482 U.S. 929, 107 S.Ct. 3213, 96 L.Ed.2d 700 (1987). See also Ark. Code Ann sec. 12-12-704 (Michie 1987). There was no obligation for the prosecution to make a written stipulation, regardless of any alleged oral agreement it may have made before Houston took the polygraph tests. The Court of Appeals determined that Houston's counsel's representation did not fall below an objective standard of reasonableness. The appellate court was also of the opinion that there was no reasonable probability that admission of the results would have affected the outcome of Houston's trial. The district court's judgment in denying the writ was affirmed.

Judge Loken dissented. Loken noted that Houston alleged that his trial attorneys, the prosecutor, and the trial judge orally agreed that if Houston took a pretrial polygraph either side could introduce the results at trial. Houston took and passed the test, but the favorable results were nonetheless inadmissible because the agreement was not in writing. Loken said that failure to get the deal in writing should have been reviewed, and the evidence against Houston was not overwhelming as there were witnesses who corroborated Houston's denial and there was evidence of the 12-year-old having falsely accused another family member of such activity. The polygraph test results, in bolstering Houston's credibility might well have made a difference. Effective counsel might have insisted on a written stipulation, knowing it was required for admissibility.

Accordingly, an order for hearing en banc was ordered for 21 July 1992.

Tenth Circuit

Green v. Roberts, 798 F.Supp. 649 (D.Kan. 1992)

Defendant was convicted of murder, 781 P.2d 678, and sentenced to the El Dorado Correctional Facility in Kansas. On petition for a writ of habeas corpus the U.S. District Court considered the assertion that Green's right to a fair trial had been violated because of the prosecutor's question to a defense witness concerning the witness' failure to pass a polygraph examination, and the prosecutor's comments on that point. There was also comment on the defendant's post-arrest silence, which he said violated his Fifth Amendment Right.

In regard to the polygraph issue, the U.S. District Court noted that the defense witness' testimony was impeached by factual evidence. The Court noted that Kansas law on polygraph evidence

Norman Ansley

does not permit admissibility absent stipulation, but state evidentiary rulings are not scrutinized by the federal courts unless they are fundamentally unfair. Here, the results of the witness' test was not at issue, and curative instructions were given the jury.

The Court held that the evidence did not render the trial so unfair the petitioner's rights were denied. The petition for the writ was dismissed and all relief denied.

California

People v. Price, 821 P.2d 610, 1 Cal. 4th 324, 3 Cal.Rptr.2d 106 (Cal. en banc 1991), rehearing denied, February 19, 1992

Defendant was convicted of first degree murder, robbery, use of a firearm, burglary, receiving stolen property, and conspiracy. He was sentenced to death and there was automatic appeal.

At trial defense moved to admit results of a police polygraph test of a witness which indicated deception. The trial court denied the motion relying on Evidence Code sections 351.1 and 352. The Supreme Court of California, en banc, said the ruling was correct because the defendant did not offer to prove that the polygraph had been accepted in the scientific community as a reliable technique, as required. Defense said this was not necessary when using a prosecution administered test to impeach a prosecution witness. The Court replied that although "The prosecution has a duty to inform the defense of polygraph results that cast doubt on the credibility of a prosecution witness, the existence of this duty does not make the results admissible." The Court added that there is no due process right to present evidence of test results if the test results are not generally accepted as reliable in the scientific community.

The execution of the sentence for burglary was stayed, but in all other respects the judgment was affirmed.

People v. Espinoza, 12 Cal.Rptr.2d 682, 838 P.2d 204 (Cal. 1992)

Defendant was convicted of first degree murder and sentenced to death. On automatic appeal to the California Supreme Court, the Court was asked to decide on whether the exclusion of a motion on the defendant's offer to take a polygraph test violated his due process rights.

On the day of his arrest, Espinoza agreed to take a polygraph examination. He denied knowledge of the murder and knowing the victims. Just before the polygraph examination he asked to speak privately with a detective, and admitted he was present when the two were murdered, but said one Alfredo Reyes, acting alone, had

Review of Polygraph Case Law for 1992-1992

killed them. No test was administered and in his opening statement defense counsel told the jury that the evidence would show the defendant had agreed to submit to a polygraph examination. The Court ordered the statement stricken from the record and admonished the jury not to consider it.

California Evidence Code section 351.1 specifically excludes results of a polygraph examination unless all parties stipulate to the admission, and excludes evidence of an offer to take such a test. The Supreme Court said the law codified a rule adopted by the Court in People v. Jones, 52 Cal.2d 636, 343 P.2d 577 (1959), and willingness to take a test was banned in People v. Thornton, 11 Cal.3d 738, 114 Ca.Rptr. 467, 523 P.2d 267 (1974). The Supreme Court of California said these cases and the Evidence Code amply supported the exclusion of defendant's willingness to take a polygraph test. The Court held that the exclusion did not violate the defendant's due process rights under the Fourteenth Amendment, as all the evidence could have done was to bolster his credibility.

Judgment affirmed in its entirety.

Connecticut

State v. Duntz, 233 Conn. 207, 613 A.2d 224 (Conn. 1992)

Defendant was convicted of murder and sentenced to 60 years, and he appealed.

Defendant claimed that the trial court improperly prevented him from introducing evidence that a defense witness had been administered and passed a polygraph examination by the state police.

The Supreme Court of Connecticut held that because of "the questionable accuracy of polygraph examinations" they have consistently held they are not admissible either for substantive or impeachment purposes. State v. Plourde, 208 Conn. 455, 545 A.2d 1071 (1988), cert. denied 488 U.S. 1034, 109 S.Ct. 847, 102 L.Ed.2d 979 (1989).

Reversed and remanded for other reasons.

Delaware

Melvin v. State, 606 A.2d 69 (Delaware 1992)

As a juvenile, defendant was convicted in family court of possession of cocaine, and he appealed.

The Supreme Court of Delaware held it was improper for the trial court to suggest that defendant submit to a polygraph

Norman Ansley

examination. The defense offered no evidence or testimony, and the issue was whether the cocaine capsule found on the ground where Melvin had been standing was his. The judge suggested to Counsel he talk to the boy about a polygraph test to prove his view was wrong, a view based on the circumstantial evidence. He added that if the test indicated Melvin did not have possession then the charge would be dismissed. If Melvin showed deception, said the judge, "Then I enter my finding." Although the judge did not say what the finding was going to be, he observed, "I think most of you here can tell pretty well what it is going to be." The defendant agreed to the test. However, at a later date the defendant's counsel informed the court that upon his advice, Melvin had decided not to take the test. Counsel also objected to the admission into evidence any reference to a polygraph or reference to Melvin's refusal. Without response to counsel's objection the court found Melvin guilty, then added, "I gave him an opportunity to clear himself."

The Supreme Court of Delaware said that except for stipulated admissibility, introduction of polygraph evidence is not permitted in Delaware, Foraker v. State, 394 A.2d 208 (Del.Supr. 1978). The exception is allowed under Thompson v. State, 399 A.2d 194 (Del.Supr. 1979).

The Supreme Court said the trial judge's reliance on Melvin's refusal to submit to a polygraph test violated Melvin's constitutional right to self-incrimination, as a polygraph test is testimonial evidence. The court cited Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) in support of the view that polygraph results are testimonial evidence, not physical evidence. The prosecution said the judge did not rely on Melvin's refusal, and if he did, it was harmless. The state Supreme Court disagreed, and reversed and remanded for a new trial before a different judge.

Georgia

Collar v. State, 426 S.E.2d 43 (Ga.App. 1992)

Defendant was convicted of child molestation (his daughter), and he appealed.

Defendant claimed the trial court erred by excluding testimony concerning the results of a polygraph examination conducted by the Georgia Bureau of Investigation. Evidence disclosed that although the State was prepared to stipulate to admissibility, Collar refused to do so. Also, the results which Collar sought to introduce concerned juvenile proceedings involving custody of his daughter, and not the criminal case. Therefore, said the Court of Appeals, there was no stipulation as required by State v. Chambers, 239 S.E.2d 324. Judgment affirmed.

Review of Polygraph Case Law for 1992-1992

McIntyre v. State, 427 S.E.2d 99 (Ga.App. 1993)

Defendant was convicted of simple and aggravated child molestation against his 13-year-old stepdaughter, and he appealed.

Defendant claimed the trial court erred in refusing to admit evidence from a polygraph test favorable to the defendant. Prior to trial the defendant submitted to a polygraph test without participation or stipulation by the state. Thereafter, he offered to submit to a state-conducted polygraph examination, but it was not done. The Court of Appeals said absent a stipulation, the results were inadmissible, and the rule in State v. Chambers, 239 S.E.2d 324 (1977) is based on the scientific unreliability of such tests.

Judgment affirmed.

Johnson v. State, 93 FCDR 1231 (Case. No. A92A2108, March 9, 1993, Georgia Court of Appeals)

Defendant was convicted of aggravated child molestation and two counts of child molestation, and he appealed.

Defendant held the trial court erred in admitting his inculpatory statements made during the pre-test and post-test stages of an unstipulated polygraph examination. The trial court had ruled the examination results were inadmissible because there was no stipulation. The record reveals that the statements were made during and as a result of the polygraph examination, and that the examination, according to the examiner, includes the pre-test and post-test, as integral parts of the examination. The Georgia Court of Appeals decided that since the statements were part of an unstipulated examination, the statements were inadmissible. The error was not harmless. Reversed and remanded for a new trial.

Pope, C.J. and Carley, P.J., concurring, noted they were troubled by the fact that Johnson was advised by counsel, prior to entering the examination room, that the polygraph test was unstipulated and therefore nothing he said would be used against him at trial. They also observed that the voluntariness of the statements was drawn into question by the fact that Johnson's counsel was not permitted in the examination room during the test.

[cited in Opinions Weekly, April 9, 1993 at 1231 and the Fulton County Daily Report, April 5, 1993.]

Illinois

People v. Melock, 149 Ill.2d 423, 599 N.E.2d 941 (Ill. 1992)

Defendant was convicted of first degree murder and sentenced to death. He appealed.

Defendant confessed to the murder of his grandmother, and the evidence of his guilt consisted largely of his confession. In addition to his confession to the police, a convicted felon testified that while they were in police holding cells Melock admitted to the murder. He claimed his admission to police was the product of an illegal arrest, and the confession was made without Miranda warnings. On the second day of his questioning by police defendant offered to take a polygraph examination. He was not yet under arrest and had accompanied police to the police station on both days. The Waukegan police transported him to Chicago for an examination, a trip of two hours including lunch. The examiner did not give a Miranda warning before the test and told Melock he was free to leave. After the examination and a discussion of deceptive results in another room, Melock admitted he had killed his grandmother. A detective was summoned who then gave Melock a Miranda warning and took his statement.

Agreeing with the trial court, the state Supreme Court held that a reasonable person in Melock's shoes would not have believed he was under arrest, thus no violation of the Fourteenth Amendment rights. The Court held Melock was not in custody at the time of the interrogation, so Miranda warnings were not required. Defendant said his will was overborne because the examiner was deceptive about the test results, which were not deceptive, but in fact could not be read. The examiner said they could not be read because of the examinee's conduct such as moving and deep breathing, and said that such behavior usually means the examinee has lied. The Court held that the examiner's statements were deceptively designed to procure the defendant's confession, but the Court was of the opinion that the defendant's inculpatory statements were voluntary and admissible.

However, the motion in limine that prevented mention of the polygraph examination was violated by defense counsel in his opening statement. The examiner testified as an "investigative consultant" which limited the cross-examination. No fair trial could be held said the defense without introducing the fact that a polygraph examination was given for the limited purpose of considering the reliability of a confession. The Court considered cases from other jurisdictions where evidence of a test was admitted for this limited purpose, but considered submission of such evidence would be contrary to Illinois procedure. But then they found an Illinois precedent which caused consideration. In People v. Lettrick, 413 Ill. 172, 108 N.E.2d 488 (1952) they held that a trial court unduly restricted the defendant's cross-examination of the witness, when he wasn't allowed to elicit

Review of Polygraph Case Law for 1992-1992

testimony about questions asked of him during the test, while "the polygraph machine was being used." This was like Melock, and the Illinois Supreme Court ruled the defendant was deprived of a fundamental right to a fair opportunity present a defense.

Reversed and remanded with instructions.

[see also Chicago Daily Law Bulletin, August 6, 1992 and September 30, 1992]

People v. Gard, 602 N.E.2d 920 (Ill.App. 5 Dist. 1992)

Defendant was convicted of arson to defraud an insurance company, and he appealed.

Gard said the court erred in allowing mention of polygraph tests during his trial. An unsentenced co-defendant who had pleaded guilty to two counts of arson mentioned in direct testimony as a witness that a man had given her a lie detector test, but the result was not stated. Another witness was asked directly by the prosecutor if he had been asked to take a lie detector test and he said he had, adding that the defendant told him the tests were easy to beat and told him how to do it, promising him a leather jacket if he passed the test. On cross-examination by defense the witness admitted to taking the examination and being informed by the examiner that he had failed, and that after the test he confessed his knowledge regarding the fire.

The Appellate Court of Illinois, Fifth District, noted that the admission of evidence that the defendant has taken a polygraph examination is plain error, and usually reversible error. However, said the court, the same rules do not apply when the test is given to a witness, People v. Parisie, 287 N.E.2d 310 (1972). The Court said that in Gard the statements did constitute error, but the Court also found that the error did not so prejudice the defendant that he was deprived of a fair trial.

Affirmed.

East St. Louis School District v. Hayes, 604 N.E.2d 557 (Ill.App. 5 Dist. 1992)

An Assistant Principal of a school was acquitted of criminal sexual conduct and reinstated by a hearing officer after a complaint that he had fathered a child born to a junior high school student. The School District sought judicial review. The Circuit Court affirmed Hayes reinstatement and the school board appealed. At issue was the hearing officer's decision that the school district had not proven its case.

Norman Ansley

On appeal, the Court found that the hearing officer's decision was not against the manifest weight of evidence. That evidence included a polygraph examination which indicated the student, after some admissions, was telling the truth when she said Hayes was the father of her child. The testimony of the examiner was admitted into evidence by the hearing officer, who after considering other evidence decided the school district had failed to prove its case by a preponderance of evidence. Hayes was reinstated with back pay, reduced by his outside earnings while suspended. On appeal the school board argued that the polygraph results and results of a blood test did not exclude Hayes from being the father were sufficient proof, along with other testimony. However, Hayes had proof of being elsewhere on the Saturday morning the intercourse was claimed to have occurred, and the hearing officer gave that more weight. The Court declined to overturn the hearing officer's decision.

Affirmed.

People v. Kuhfuss, 608 N.E.2d 1204 (Ill.App.3 Dist. 1993).
Rehearing denied 22 March 1993.

Defendant, whose first trial resulted in a mistrial, filed a motion to dismiss the charges against him based on double jeopardy. The circuit court denied the motion, and he appealed.

The Appellate Court of Illinois, Third District, held that double jeopardy applies to retrials only where the mistrial was due to judicial or prosecutorial overreaching. In this case, the mistrial resulted from a motion by the prosecutor, following a statement by a defense witness that "we had gone and taken a lie detector test." Defense objected to the motion and asked for an instruction to the jury. The court granted the motion for the mistrial. The appellate court said the court did not abuse its discretion when it found there was manifest necessity for a mistrial which was not caused by prosecutorial misconduct. Judgment affirmed, and the case remanded for further proceedings.

Indiana

Atkinson v. State, 581 N.E.2d 1247 (Ind. 1991)

Defendant was convicted of murder, forgery, theft, and criminal mischief, and he appealed.

Appellant claimed his stipulation to take a polygraph test was not sufficient to permit the result to be admitted into evidence. The Supreme Court of Indiana dismissed his appeal in two sentences. "It is the prerogative of the accused to take a polygraph examination. When an accused executes a waiver, he cannot then complain that the State has violated his right against self-incrimination."

Affirmed.

Review of Polygraph Case Law for 1992-1992

Brown v. State, 587 N.E.2d 111 (Ind. 1992)

Defendant was convicted of two counts of murder, burglary, robbery, and confinement, and was sentenced to 176 years. He appealed.

At trial the chief witness, Ohm, was an accomplice. His plea agreement included a provision that he was to take a polygraph examination. At trial the plea agreement was admitted on the basis that the defense had opened the door in discussing the plea agreement, but not mentioning the polygraph test agreement.

The Supreme Court of Indiana held that, lacking stipulation, mention of a polygraph test requirement was error. While disclosure of a plea agreement by the State is required, the portion relating to a polygraph test requirement is irrelevant to the statements made concerning the crime and the sentence received. The portion about the polygraph test ought to have been redacted. The error was prejudicial and required that the case be reversed and remanded for a new trial. Justice Krahulik dissented, without opinion.

Louisiana

State v. Womack, 592 So.2d 872 (La.App. 2 Cir. 1991)

Defendant was convicted of second degree murder and he appealed.

The defendant claimed the trial court erred in allowing a witness to testify that he came to Louisiana to administer polygraph examinations, relying on State v. Mills, 505 So.2d 933 (La.App. 2 Cir. 1987), writ denied 508 So.2d 65 (La. 1987) to support his claim that any reference to a polygraph examination was error. The testimony showed that the defendant was willing to take the test but that no test was given due to the defendant's confession.

The Court of Appeals of Louisiana, 2nd Circuit, noted that polygraph evidence is inadmissible for any purpose in criminal trials in Louisiana. State v. Hocum, 456 So.2d 602 (La. 1984). However, they also said an appellate court will not automatically reverse a conviction whenever an impermissible reference to a polygraph examination is made during a criminal trial. A reversal and new trial is required only if there is a reasonable possibility that the error complained of might have contributed to the conviction. The appellate court held that the brief, unsolicited reference to polygraph was not an impermissible or erroneous reference to test results. The statement by the defendant before the proposed test was admissible. The circumstances surrounding the statement were admissible to prove its credibility.

The appeal was without merit. Conviction affirmed.

Maryland

State v. Hawkins, 604 A.2d 489, 326 Md. 270 (1992)

Defendant was convicted of first-degree felony-murder, and being an accessory after the fact, and she appealed. The Court of Special Appeals vacated and certiorari was granted. 589 A.2d 489, 89 Md.App. 195.

During the court of testimony of police officers who interrogated Hawkins, the word "polygraph" was used twice, inadvertently, and not in response to a question that would have called for the use of the word. In both cases, the reference was to a "polygraph suite," where she was placed under arrest, and an "area next to the polygraph room." Defense moved for a mistrial.

The Court of Appeals, Maryland's highest court, said, "In criminal prosecutions, the polygraph test is a pariah; 'polygraph' is a dirty word." The Court noted that although the use of the word was inadvertent that does not mean it is not prejudicial. The trial judge in this case denied the motion for a mistrial and referred to the utterances of the word "polygraph" as "blurts," and the Court of Appeals agreed. After a lengthy discussion of related cases, the Court of Appeals decided that Hawkins was not prejudiced, and there was no abuse of discretion in the denial of the motion for a mistrial.

The judgment of the Court of Special Appeals was reversed and the case remanded to that court with direction to affirm the judgment entered by the circuit court on the murder conviction and to vacate the judgment entered on the accessory after the fact conviction.

Patrick v. State, 617 A.2d 215 (Md. 1992)

Defendant was convicted of felony murder and he appealed. The Court of Special Appeals affirmed, 601 A.2d 1133. The Court of Appeals (Maryland's highest court) granted certiorari.

At issue was whether the defendant was entitled under discovery to obtain polygraph results from tests administered to anyone during the government's investigation. The Court of Appeals noted that polygraph results are inadmissible at trial, Jonson v. State, 303 Md 487, 495 A.2d 1 (1985), cert. denied. 474 U.S. 1093, 106 S.Ct. 868, 88 L.Ed.2d 907 (1986). The Court of Special Appeals decided that a polygraph test was not a scientific test for purposes of Maryland Rule 4-263(b)(4) which might otherwise have required discovery. Also noted was a hearing by the trial court which determined that the polygraph materials did not contain exculpatory items.

Review of Polygraph Case Law for 1992-1992

The Maryland Court of Appeals concluded that reports of state experts who have conducted polygraph examinations, whether exculpatory of the accused's guilt or not, constitute discoverable "scientific tests" within the Maryland Rule 4-263(b)(4), adding that not every violation of a discovery rule requires a reversal. In this case the Appellate Court remanded to the Circuit Court for Cecil County a requirement to hold a hearing at which the state will be required to produce the polygraph tests, at which Defendant's counsel is to be afforded the opportunity to review the material and argue that the nondisclosure was prejudicial to the defense. If the trial court decides that failure to disclose was not prejudicial, the conviction shall stand. If the defense was prejudiced, a new trial must be ordered.

Massachusetts

Commonwealth v. Tanso, 583 N.E.2d 1247, 411 Mass. 640 (1992)

Defendant was convicted of two counts of murder and he appealed.

Defendant filed a motion for a polygraph examination, and to have the results admitted into evidence. The request was denied. The Supreme Judicial Court of Massachusetts said the argument was disposed of by their holding in Commonwealth v. Mendes, 406 Mass. 201, 547 N.E.2d 35 (1989), finding polygraph evidence inadmissible.

Reversed and remanded for other reasons.

Missouri

State v. Ferguson, 822 S.W.2d 466 (Mo.App. 1991), motion for rehearing and transfer to Supreme Court denied. Application to transfer denied February 25, 1992.

Defendant was convicted of rape and sodomy, and post-conviction relief was denied. Defendant appealed.

Defendant claimed the trial court abused its discretion by refusing to admit the results of polygraph examinations.

The Missouri Court of Appeals, Eastern District, Southern Division, said there was no error as evidence of polygraph examinations are inadmissible, State v. Biddle, 599 S.W.2d 182 (Mo. banc 1980).

Conviction affirmed, and matter remanded relating to imposition of consecutive sentences.

Norman Ansley

Nevada

Kazalyn v. State, 825 P.2d 578 (Nev. 1992)

Defendant was convicted of murder with a deadly weapon. He caused her death when he left her incapacitated in the roadway and watched while a vehicle struck her helpless form. He was sentenced to life imprisonment without benefit of parole, and he appealed.

Kazalyn made statements to the police and offered several times to take a polygraph examination to prove that his version of the circumstances of his wife's death was the truth. At trial, his three statements were admitted into evidence, including his offers to take polygraph examinations. On appeal, Kazalyn argued that admission of his offers were reversible error.

In Santillanes v. State, 102 Nev. 48, 714 P.2d 184 (1986), the Supreme Court of Nevada held that defendant's refusal to offer to submit to a polygraph examination was inadmissible, and incompetent evidence. In Davis v. State, 107 Nev. 600, 817 P.2d 1169 (1991) the Court held that admission of the defendant's video taped statement wherein he offered to take a polygraph examination and subsequent prosecutorial references to the offer was harmless error. In Kazalyn there was no emphasis on the offer. Rather, the offers came into evidence simply as part of the interviews between Kazalyn and a police detective. Actually, the defendant enhanced his credibility by the admissibility, and he failed to show that the jury was prejudiced against him by the admission of the statements. The Court held the admission of the statements was harmless error.

The Court found no error in the guilt phase of the trial. They found the penalty enhancement for use of a deadly weapon was in error and vacated the life sentence imposed for the use of a deadly weapon.

Ohio

City of Warrensville Heights v. Jennings et al., 53 Ohio St.3d 206, 569 N.E.2d 489 (Ohio 1991)

Discharged police dispatcher sought unemployment compensation benefits, after being fired for refusing an order by the Chief of Police to take a polygraph examination.

The Supreme Court of Ohio took note of the higher standard of conduct required of police officers. The topic of the investigation was Green's possible use of drugs, which related to performance of his official duties. The dispatcher was aware that the Chief was not seeking prosecution, and the results of the test would not be used in criminal proceedings, and the order to take the test was reasonable considering that he had been arrested by

Review of Polygraph Case Law for 1992-1992

another police department after he was found in a bathroom stall at a theater with two friends where cocaine and marijuana were in the toilet bowl. The state Supreme Court found that Jennings' refusal to take the polygraph test constituted "just cause" for his discharge.

The Court observed that the polygraph is reliable enough for some purposes. When polygraph tests are used for internal investigations the questions must relate narrowly to performance of his duties, the answers cannot be used against the officer in any subsequent prosecution, and the warnings given must mention the lack of prosecution and the fact that the officer may be discharged if he refuses the test. These requirements were met in the present case. Jennings, said the Court, is disqualified from receiving unemployment compensation.

State v. Rapp, 585 N.E.2d 965 (Ohio App. 4 Dist. 1990)

Defendant was convicted of trafficking in marijuana, and he appealed.

Defendant claimed the trial court erred in allowing the state, over objection, to introduce evidence of and results of a polygraph examination and urinalysis test of the state's key witness, an undercover agent. This, said the appellate court, was more than mere reference to a test, as the name of the examinee and the results of the polygraph examination were revealed. The Court could not view this as harmless error, as it would encourage a jury to disbelieve the defense of entrapment.

Reversed and remanded for further proceedings.

State v. Rowe, 589 N.E.2d 394, 68 Ohio App.3d 595 (Ohio App. 10 Dist. 1990)

Defendant was convicted of murder with a firearm, and she appealed.

Defendant argued that it was prejudicial error to allow the prosecution to use the fact of and results of her co-defendant's polygraph examination at trial. In Ohio, polygraph results of a defendant may be admissible for purposes of corroboration or impeachment providing there is a signed pretest stipulation, and the judge concurs in its admissibility. The testimony of the examiner is subject to cross-examination about his qualifications and training, the conditions of the test, and the limitations and possibility for error. There is also a requirement that the judge instruct the jury. State v. Souel, 53 Ohio St.2d 123, 372 N.E.2d 1318 (1978). In Rowe there was no stipulation of any kind. The Ohio appellate court said that if polygraph test results of a

Norman Ansley

witness can ever be admitted, the requirements of Souel must be met.

Reversed and remanded.

State v. Manning, 74 Ohio App.3d 19, 598 N.E.2d 25 (Ohio App. 9 Dist. 1991) Motion to appeal to Supreme Court denied 62 Ohio St.3d 1434, 578 N.E.2d 825.

Defendant was convicted of murder, and she appealed. She claimed the trial court erred in permitting a Children Services case worker and a police detective to mention a polygraph examination taken by the victim (defendant's husband) which indicated he had not molested her daughter. Defendant claimed error in that results were not stipulated for admission as required under State v. Souel, 53 Ohio St.2d 123, and O.O.3d 207, 372 N.E.2d 1318 (1978) and Brown v. Best Products Co., 18 Ohio St.3d 32, 18 O.B.R. 69, 479 N.E.2d 852 (1985).

However, the Ohio Supreme Court distinguished this case from those cases requiring stipulation by noting that in another case police officers in defending against a civil claim of malicious prosecution should have been allowed to present polygraph results on their behalf to demonstrate the officers state of mind during the plaintiff's arrest. Examinees were state witnesses in rape proceedings against the plaintiffs. The Court held a similar conclusion was warranted in Manning, as the results of Todd Manning's polygraph test were offered to demonstrate that Ginger Manning had reason to believe he had not, in fact, molested her daughter. Such testimony was relevant to rebut in part, her claim of self-defense.

Judgment affirmed.

Oklahoma

Harris v. State, 841 P.2d 597 (Okla. Cr. 1992)

Defendant was convicted of first degree murder and he appealed.

Defendant claimed it was improper to base a grant of immunity upon condition of successfully taking a polygraph examination. Defendant's limited immunity was based on four conditions, one of which was passing a polygraph test. The State presented testimony of a certified polygraph examiner who has conducted 1,800 examinations, and who testified that Harris did not truthfully answer questions posed to him, questions which were reviewed in court. The Court of Criminal Appeals observed that appellant was required to undergo such an examination merely for the purposes of discovery and investigation. The Court did not find it improper for the

Review of Polygraph Case Law for 1992-1992

grant of limited immunity to have been based in part on the successful taking of a polygraph examination. The Court said that based on their review of the record, the trial court properly found that Harris had not answered the questions truthfully, and therefore had breached the agreement under which he was granted limited immunity.

Pennsylvania

Commonwealth v. Rhone, 619 A.2d 1080 (Pa.Super. 1993)

Defendant was convicted of first degree murder, and he appealed.

During testimony a police detective inadvertently mentioned that he told the defendant that he would "like to interview him and would he like to take a polygraph." Defense requested a mistrial, which was not granted. The Superior Court of Pennsylvania, on review, said the trial court's striking of the remark from the record and subsequent instruction to the jury insured that no prejudice resulted. The court noted that polygraph test results are inadmissible in Pennsylvania, Commonwealth v. Camm, 443 Pa. 253, 277 A.2d 325 (1971), cert. denied 405 U.S. 1046, 92 S.Ct. 1320, 31 L.Ed.2d 589 (1972). Judgment was affirmed.

Commonwealth v. Butler, 621 A.2d 630 (Pa.Super. en banc 1993)

Defendant was convicted of indecent assault, endangering welfare of a child, and corrupting a minor, and he appealed. In this case charges were based on complaint of an eleven-year-old student that the pastor of the church school had indulged in prolonged hugging with her on December 12, 1990. She said that while doing so he fondled her buttocks and rubbed his clothed genital area against her.

Following his arrest, defendant's attorney entered into an agreement with a Pittsburgh police detective that if the defendant volunteered and passed a polygraph test, the charges against him would be dropped. Defendant took the test and passed it. However, afterwards the victim also passed a polygraph test, so the Commonwealth decided to bring charges. Counsel's move to dismiss charges resulted in a hearing in which the detective had a different recollection of the discussion than did the defendant's original counsel. Trial court ruled against the motion on the basis that police officers do not have the authority to bind the Commonwealth. The Court also found there was no meeting of the minds.

The Court of Appeals said that while a police officer may bind the Commonwealth with deals, they did not believe such an agreement was reached. The Court also dismissed the argument that the test

Norman Ansley

results should have been admitted at trial, as such results are inadmissible, Commonwealth v. Rodriguez, 343 Pa.Super. 486, 495 A.2d 569 (1985).

However, the Court reversed and remanded for a new trial because the trial court barred the defendant from introducing evidence of the victim's reputation in the community for untruthfulness.

Judge Olszewski, concurring, disagreed with the finding that a police officer could bind the prosecutor with an agreement.

Judge Cirillo, dissenting, said this was a fitting example of circumstances in which estoppel theory should be applied to criminal matter. Here, Butler surrendered his privilege against self-incrimination and right to counsel in reasonable reliance on a promise. The Commonwealth, said Cirillo, must be estopped from claiming no deal ever existed. Cirillo would uphold the agreement in question and dismiss the charges against Butler.

Texas

Lugo-Lugo v. State, 650 S.W.2d 72 (Tex.Cr.App. 1983*)

Defendant was convicted of murder and he appealed. Motion for rehearing granted and judgment affirmed by the Court of Criminal Appeals of Texas.

Appellant claimed the court erred in admitting his confession into evidence, a statement made to Tony Barrio. In the trial testimony the prosecutor asked Dr. Barrio, "At any time during the polygraph examination or after its conclusion did Lugo-Lugo indicate to you he was willing to make a statement to the police?" In the next exchange the witness said the "document was filled out in my handwriting in Mr. Lugo-Lugo's presence and this was made immediately after completion of the examination in the room adjacent to the polygraph room."

The appellant was not appealing over the mention of the polygraph examination in testimony. Rather, he claimed the confession was illegally obtained by use of a polygraph examination and photographs of the deceased. In that regard the examiner did admit showing the defendant photographs, and admitting giving him a polygraph examination. The Court of Appeals did not find error in the trial court's conduct of the case.

However, a rehearing was granted on an issue involving the meaning of "culpable mental state."

* Although a 1983 case, it was reviewed at the request of Dr. Tony Barrio.

Review of Polygraph Case Law for 1992-1992

Sparks v. State, 820 S.W.2d 924 (Tex.App. - Austin, 1991)

Defendant was convicted of burglary and he appealed.

During trial, the prosecution, over objection, was allowed to reopen its evidence in order to call a rebuttal witness. The prosecutor asked the witness, "Did you ever agree to take a polygraph test?" Defense objected and moved for a mistrial which was denied. The appellant said this had the effect of bolstering the credibility of the witness.

The Court of Appeals of Texas - Austin, agreed that it bolstered the credibility of the witness, that it was error, that the prosecution's question, by admission of the State, was improper and an answer would have been inadmissible. The witness was the perpetrator of the burglary according to the defendant's account. The error was not harmless. The judgment of the trial court was reversed and remanded for a new trial.

Virginia

Pugliese v. Commonwealth, 428 S.E.2d 16 (Va.App. 1993)

Defendant was convicted of murder as principal in second degree, and robbery, and he appealed.

The Court of Appeals of Virginia said that the admission into evidence of the entire, unedited recorded conversation between the defendant and police officers, including defendant's statement he was willing to take a lie detector test, did not constitute prejudicial error. The Court noted that it is generally improper to admit evidence that the accused has been willing to take a lie detector test, Barber v. Commonwealth, 142 S.E.2d 484 (Va. 1965). Nevertheless, said the Court, admission of such evidence is not reversible evidence unless it is prejudicial. Because his statements were voluntary, initiated by Pugliese, and arguably favored him, the result did not harm him. Moreover, editing out his offers to take a test would have sacrificed the continuity of the conversation, as his offers were interspersed throughout the recording.

Affirmed.

* * * * *

MISSISSIPPI POLYGRAPH EXAMINERS LICENSING LAW

Effective Date July 1993.

AN ACT TO REENACT SECTIONS 73-29-1 THROUGH 73-29-47, MISSISSIPPI CODE OF 1972, WHICH CREATE THE POLYGRAPH EXAMINERS BOARD AND PRESCRIBE ITS DUTIES AND POWERS; AND FOR RELATED PURPOSES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

SECTION 1. The following shall be reenacted and codified as Section 73-29-1, Mississippi Code of 1972:

73-29-1. This chapter shall be known, and may be cited, as "the Polygraph Examiners Law."

SECTION 2. The following shall be reenacted and codified as Sections 73-29-3, Mississippi Code of 1972:

73-29-3. In this chapter, unless the context requires a different definition:

"Board: means the Polygraph Examiners Board;

"Secretary" means that member of the Polygraph Examiners Board selected by the board to act as secretary;

"Internship" means the study of polygraph examinations and of the administration of polygraph examinations by a trainee under the personal supervision and control of a polygraph examiner in accordance with a course of study prescribed by the board at the commencement of such internship;

"Person" means any natural person, firm, association, copartnership, or corporation; and

"Polygraph examiner" means any person who uses any device or instrument to test or question individuals for the purpose of verifying truth of statements.

SECTION 3. The following shall be reenacted and codified as Section 73-29-5, Mississippi Code of 1972:

73-29-5. Every polygraph examiner shall use an instrument which records visually, permanently, and simultaneously: (1) a subject's cardiovascular pattern and (2) a subject's respiratory pattern. patterns of other physiological changes in addition to (1) and (2) may also be recorded.

SECTION 4. The following shall be reenacted and codified as Section 73-29-7, Mississippi Code of 1972:

Mississippi Polygraph Examiners Licensing Law

73-29-7. (a) There is hereby established a polygraph examiners board consisting of three (3) members who shall be citizens of the United States and residents of the state for at least two (2) years prior to appointment and at the time of appointment are active polygraph examiners. No two (2) board members may be employed by the same person or agency. At least one (1) member must be a qualified examiner of a governmental law enforcement agency, and shall be the supervisor of the polygraph section of the Department of Public Safety, and at least one (1) member must be a qualified polygraph examiner in the commercial field. The members shall be appointed by the Governor of the State of Mississippi with the advice and consent of the Senate for a term of six (6) years. The terms of office of members appointed to the initial board are one (1) for two (2) years; one (1) for four (4) years; and one (1) for six (6) years. Any vacancy in an unexpired term shall be filled by appointment of the Governor with the advice and consent of the Senate for the unexpired term.

(b) The board shall elect a chairman, vice chairman, and secretary from among its members.

(c) The vote of a majority of the board members is sufficient for passage of any business or proposal which comes before the board.

(d) The members of the board shall receive Twenty-two Dollars and Fifty Cents (\$22.50) per diem for each day spent in the actual discharge of their duties.

SECTION 5. The following shall be reenacted and codified as Section 73-29-9, Mississippi Code of 1972:

73-29-9. (a) The board shall issue regulations consistent with the provisions of this chapter for the administration and enforcement of this chapter and shall prescribe forms which shall be issued in connection therewith.

(b) An order of a certified copy thereof, over the board seal and purporting to be signed by the board members, shall be prima facie proof that the signatures are the genuine signatures of the board members, and that the board members are fully qualified to act.

(c) All fees collected under the provisions of this chapter shall be paid to the Treasurer of the State of Mississippi. Funds necessary for the enforcement of this chapter and the administration of its provisions shall be appropriated by the Legislature, but the funds so appropriated for a fiscal year shall not exceed the total amount of the fees which it is anticipated will be collected hereunder during such fiscal year, plus the amount of funds which were unexpended by the board for the next preceding fiscal year.

Mississippi Polygraph Examiners Licensing Law

(d) The board shall, prior to November 1 of each year, submit to the Attorney General of Mississippi and the Legislature, a detailed, written report on all the activities of the board and all expenditures made by it during the preceding fiscal year ending June 30.

SECTION 6. The following shall be reenacted and codified as Section 73-29-11, Mississippi Code of 1972:

73-29-11. It shall be unlawful for any person, including a city, county or state employee, to administer polygraph examinations or attempt to hold himself out as a polygraph examiner without a license approved by the board and issued by the board.

SECTION 7. The following shall be reenacted and codified as Section 73-29-13, Mississippi Code of 1972:

73-29-13. A person is qualified to receive a license as an examiner:

- (1) Who is at least twenty-one (21) years of age;
- (2) Who is a citizen of the United States;
- (3) Who establishes that he is a person of honesty, truthfulness, integrity, and moral fitness;
- (4) Who has not been convicted of a felony or a misdemeanor involving moral turpitude;
- (5) Who holds a baccalaureate degree from a college or university accredited by the American Association of Collegiate Registrars and Admissions Officers or, in lieu thereof, has five (5) consecutive years of active investigative experience immediately preceding his application;
- (6) Who is a graduate of a polygraph examiners course approved by the board and has satisfactorily completed not less than six (6) months of internship training, provided that if the applicant is not a graduate of an approved polygraph examiners course, satisfactory completion of not less than twelve (12) months of internship training may satisfy this subdivision; and
- (7) Prior to the issuance of a license, the applicant must furnish to the board evidence of a surety bond or insurance policy. Said surety bond or insurance policy shall be in the sum of Five Thousand Dollars (\$5,000.00) and shall be condition that the obligor therein will pay to the extent of the face amount of such surety bond or insurance policy all judgments which may be recovered against the licensee by reason of any wrongful or illegal acts committed by him in the course of his examinations.

Mississippi Polygraph Examiners Licensing Law

SECTION 8. The following shall be reenacted and codified as Section 73-29-15, Mississippi Code of 1972:

73-29-15. Applications for original licenses shall be made to the secretary of the board in writing under oath on forms prescribed by the board, to which forms must be affixed the applicant's fingerprints and a recent photograph, and shall be accompanied by the required fee which is not refundable. Any such application shall require such information as in the judgment of the board will enable it to pass on the qualifications of the applicant for a license.

SECTION 9. The following shall be reenacted and codified as Section 73-29-17, Mississippi Code of 1972:

73-29-17. (a) Each nonresident applicant for an original license or a renewal license shall file with the board an irrevocable consent that actions against said applicant may be filed in any appropriate court of any county or municipality of this state in which the plaintiff resides or in which some part of the transaction occurred out of which the alleged cause of action arose and that process on any such action may be served on the applicant by leaving two (2) copies thereof with the secretary. Such consent shall stipulate and agree that such service of process shall be taken and held to be valid and binding for all purposes. The secretary of the board shall send forthwith one (1) copy of the process to the applicant at the address shown on the records of the board by registered or certified mail.

(b) Nonresident applicants must satisfy the requirements of Section 73-29-13, and furnish also a recent photograph and fingerprints.

SECTION 10. The following shall be reenacted and codified as Section 73-29-19, Mississippi Code of 1972:

73-29-19. An applicant who is a polygraph examiner licensed under the laws of another state or territory of the United States may be issued a license upon payment of a fee of Fifty Dollars (\$50.00) and the production of satisfactory proof that:

- (1) He is at least twenty-one (21) years of age;
- (2) He is a citizen of the United States;
- (3) He is of good moral character;

(4) The requirements for the licensing of polygraph examiners in such particular state or territory of the United States were, at the date of the applicant's licensing therein, substantially equivalent to the requirements now in force in this state;

Mississippi Polygraph Examiners Licensing Law

(5) The applicant had lawfully engaged in the administration of polygraph examinations under the laws of such state or territory for at least two (2) years prior to his application for license hereunder;

(6) Such other state or territory grants similar reciprocity to license holders of this state; and

(7) He has complied with section 73-29-17.

SECTION 11. The following shall be reenacted and codified as Section 73-29-21, Mississippi Code of 1972:

73-29-21. (a) Upon approval by the board, the secretary shall issue an internship license to a trainee provided he applies for such license and pays the required fee within ten (10) days prior to the commencement of his internship. The application shall contain such information as may be required by the board.

(b) An internship license shall be valid for the term of twelve (12) months from the date of issue. Such license may be extended or renewed for any term not to exceed six (6) months upon good cause shown to the board.

(c) A trainee shall not be entitled to hold an internship license after the expiration of the original twelve-month period and six-month extension if such extension is granted by the board until twelve (12) months after the date of expiration of the last internship license held by said trainee.

(d) If a polygraph examiner is not available to personally supervise a trainee in the internship program, then a member of the board shall supervise and sponsor the trainee.

SECTION 12. The following shall be reenacted and codified as Section 73-29-23, Mississippi Code of 1972:

73-29-23. The fee to be paid for an original polygraph examiner's license is Fifty Dollars (\$50.00).

The fee to be paid for an internship license is Thirty Dollars (\$30.00).

The fee to be paid for the issuance of a duplicate polygraph examiner's license is Ten Dollars (\$10.00).

The fee to be paid for a polygraph examiner's renewal license is Fifty Dollars (\$50.00).

The fee to be paid for the extension or renewal of an internship license is Twenty-Five Dollars (\$25.00).

Mississippi Polygraph Examiners Licensing Law

The fee to be paid for a duplicate internship license is Ten Dollars (\$10.00).

The fees required by this chapter may be paid by the governmental agency employing the examiner.

SECTION 13. The following shall be reenacted and codified as Section 73-29-25, Mississippi Code of 1972:

73-29-25. A license or duplicate license must be prominently displayed at the place of business of the polygraph examiner or at the place of internship. Each license shall be signed by the board member and shall be issued under the seal of the board.

SECTION 14. The following shall be reenacted and codified as Section 73-29-27, Mississippi Code of 1972:

73-29-27. Notice in writing shall be given to the secretary by the licensed polygraph examiner of any change of principal business location within thirty (30) days of the time he changes the location.

A change of business location without notification to the secretary shall automatically suspend the license theretofore issued.

SECTION 15. The following shall be reenacted and codified as Section 73-29-29, Mississippi Code of 1972:

73-29-29. Each polygraph examiner's license shall be issued for the term of one (1) year and shall, unless suspended or revoked, be renewed annually as prescribed by the board.

SECTION 16. The following shall be reenacted and codified as Section 73-29-31, Mississippi Code of 1972:

73-29-31. The board may refuse to issue or may suspend or revoke a license on any one or more of the following grounds;

(1) For failing to inform a subject to be examined as to the nature of the examination;

(2) For failing to inform a subject to be examined that his participation in the examination is voluntary;

(3) Material misstatement in the application for original license or in the application for any renewal license under this chapter;

(4) Willful disregard or violation of this chapter or of any regulation or rule issued pursuant thereto, including, but not limited to, willfully making a false report concerning an examination for polygraph examination purposes;

Mississippi Polygraph Examiners Licensing Law

(5) If the holder of any license has been adjudged guilty of the commission of a felony or a misdemeanor involving moral turpitude;

(6) Making any willful misrepresentation or false promises or causing to be printed any false or misleading advertisement for the purpose of directly or indirectly obtaining business or trainees;

(7) Having demonstrated unworthiness or incompetency to act as a polygraph examiner as defined by this chapter;

(8) Allowing one's license under this chapter to be used by any unlicensed person in violation of the provisions of this chapter;

(9) Willfully aiding or abetting another in the violation of this chapter or any regulation or rule issued pursuant thereto;

(10) Where the license holder has been adjudged by a court of competent jurisdiction as habitual drunkard, mentally incompetent, or in need of a conservator;

(11) Failing, within a reasonable time, to provide information requested by the secretary as the result of a formal complaint to the board which would indicate a violation of this chapter;

(12) Failing to inform the subject of the results of the examination if so requested; or

(13) With regard to any polygraph examiner employed for a fee and not employed by a governmental law enforcement agency or the Mississippi Department of Corrections:

(a) Requiring a subject; prior to taking the examination or as a condition of receiving the results of the examination, to waive any rights or causes of action he may have or which may accrue in favor of the subject arising out of or resulting from the administration of the examination; except the examiner may require, prior to the examination or as a condition of receiving the results of the examination, a subject to waive any rights or causes of action that may accrue against the examiner as a result of any use made of the results of the examination by the person who employed the examiner.

(b) Requiring a subject to acknowledge that his examination is not done for purposes of employment when, in fact, the results of the examination are to be submitted to an employer or an agent of an employer; or

(c) Reporting the results of an examination to any person not authorized to receive the results of the examination except for the person who employed the examiner, unless authorized in writing by the subject.

Mississippi Polygraph Examiners Licensing Law

SECTION 17. The following shall be reenacted and codified as Section 73-29-33, Mississippi Code of 1972:

73-29-33. Any unlawful act or violation of any of the provisions of this chapter on the part of any polygraph examiner or trainee shall not be cause for revocation of the license of any other polygraph examiner for whom the offending examiner or trainee may have been employed, unless it shall appear to the satisfaction of the board that the polygraph examiner-employer has willfully or negligently aided or abetted the illegal actions or activities of the offending polygraph examiner or trainee.

SECTION 18. The following shall be reenacted and codified as Section 73-29-35, Mississippi Code of 1972:

73-29-35. Each polygraph examiner shall register with the secretary of state of the State of Mississippi and with the circuit clerk in the county wherein he maintains a business address. The circuit clerk of each county shall maintain a list of all polygraph examiners registered in his county.

SECTION 19. The following shall be reenacted and codified as Section 73-29-37, Mississippi Code of 1972:

73-29-37. (a) When there is cause to refuse an application or to suspend or revoke the license of any polygraph examiner, the board shall, not less than thirty (3) days before refusal, suspension, or revocation action is taken, notify such person in writing, in person, or by certified mail at the last address supplied to the board by such person, of such impending refusal, suspension, or revocation, the reasons thereof, and of his right to an administrative hearing for the purpose of determining whether or not the evidence is sufficient to warrant the refusal, suspension, or revocation action proposed to be taken by the board. If, within twenty (20) days after the personal service of such notice or such notice has been deposited in the United States mail, such person has not made a written request to the board for this administrative hearing, the board is authorized to suspend or revoke the polygraph examiner's license of such person without a hearing. Upon receipt by the board of such written request of such person within the twenty-day period as set out above, an opportunity for an administrative hearing shall be afforded as early as is practicable. In no case shall the hearing be held less than ten (10) days after written notification thereof, including a copy of the charges, shall have been given the person by personal service or by certified mail sent to the last address supplied to the board by the applicant or licensee. The administrative hearing in such cases shall be before the board.

(b) The board shall conduct the administrative hearings and it is authorized to administer oaths and issue subpoenas for the attendance of witnesses and the production of relevant books, papers, documents, etc. On the basis of the evidence submitted at

Mississippi Polygraph Examiners Licensing Law

the hearing, the board shall take whatever action it deems necessary in refusing the application or suspending or revoking the license.

SECTION 20. The following shall be reenacted and codified as Section 73-29-39, Mississippi Code of 1972:

73-29-39. Any person dissatisfied with the action of the board in refusing his application or suspending or revoking his license, or any other action of the board, may appeal the action of the board by filing a petition within thirty (30) days thereafter in the circuit court in the county where the person resides or in the Circuit Court of Hinds County, Mississippi, and the court is vested with jurisdiction and it shall be the duty of the court to set the matter for hearing upon ten (10) days' written notice to the board and the attorney representing the board. The court in which the petition of appeal is filed shall determine whether or not a cancellation or suspension of a license shall be abated until the hearing shall have been consummated with final judgment thereon or whether any other action of the board should be suspended pending hearing, and enter its order accordingly, which shall be operative when served upon the board, and the court shall provide the attorney representing the board with a copy of the petition and order. The board shall be represented in such appeals by the district or county attorney of the county or the attorney general, or any of their assistants. The board shall initially determine all acts, but the court upon appeal shall set aside the determination of the board if the board's determination (1) is not based upon substantial evidence upon the entire record; (2) is arbitrary or capricious; (3) is in violation of statutory requirements; or (4) was made without affording to licensee or applicant due process of law.

SECTION 21. The following shall be reenacted and codified as Section 73-29-41, Mississippi Code of 1972:

73-29-41. Upon the revocation or suspension of any license, the licensee shall forthwith surrender the license or licenses to the secretary; failure of a licensee to do so shall be a violation of this chapter and upon conviction, shall be subject to the penalties hereinafter set forth. At any time after the suspension or revocation of any license, the secretary shall restore it to the former licensee, upon the written recommendations of the board.

SECTION 22. The following shall be reenacted and codified as Section 73-29-43, Mississippi Code of 1972:

73-29-43. If any person violates any provisions of this chapter, the secretary shall, upon direction of a majority of the board, in the name of the State of Mississippi, apply in any chancery court of competent jurisdiction, for an order enjoining such violation or for an order enforcing compliance with this chapter. Upon the filing of a verified petition in the court, the

Mississippi Polygraph Examiners Licensing Law

court, or any judge thereof, if satisfied by affidavit or otherwise that the person has violated this chapter, may issue a temporary injunction, without notice or bond, enjoining such continued violation and if it is established that the person has violated or is violating this chapter, the court, or any judge thereof, may enter a decree perpetually enjoining the violation or enforcing compliance with this chapter. In case of violation of any order or decree issued under the provisions of this section, the court, or any judge thereof, may try and punish the offender for contempt of court. Proceedings under this section shall be in addition to, and not in lieu of, all other remedies and penalties provided by this chapter.

SECTION 23. The following shall be reenacted and codified as Section 73-29-45, Mississippi Code of 1972:

73-29-45. Any person who violates any provision of this chapter or any person who falsely states or represents that he has been or is a polygraph examiner or trainee shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than One Hundred Dollars (\$100.00) nor more than One Thousand Dollars (\$1,000.00) or by imprisonment in the county jail for a term of not to exceed six (56) months, or both.

SECTION 24. The following shall be reenacted and codified as Section 73-29-47, Mississippi Code of 1972:

73-29-47. Nothing in this chapter shall be construed as permitting the results of truth examinations or polygraph examinations to be introduced or admitted as evidence in a court of law.

SECTION 25. Section 73-29-49, Mississippi Code of 1972, which repeals Sections 73-29-1 through 73-29-47, creating the Polygraph Examiners Law, is repealed.

SECTION 26. This act shall take effect and be in force from and after its passage.

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THE BIBLIOGRAPHIC REVIEW

By

Janet Kay Pumphrey

Are you keeping up-to-date on articles published on detection of deception and its corollary studies? Many items are not printed in journals which are selected for indexing purposes; others are printed in local, regional, and small journals which do not have a large readership. This issue of "The Bibliographic Review" offers a selection of articles found in the Academic Index under the subject heading "deception-research". The scope and range of these articles shows that the scientific research field is exploring deception from all age and audience directions.

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DePaulo, Bella M. "Nonverbal behavior and self-presentation." Psychological Bulletin 111 (2) (March 1992): 203+

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Paulhus, Delroy L. and Douglas B. Reid. "Enhancement and denial in socially desirable responding." Journal of Personality and Social Psychology 60 (2)(February 1991): 307+

Raymond, Chris. "Deception is everywhere in life and not always bad, researchers say." The Chronicle of Higher Education 37 ((24)(February 27, 1991): A5+

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