DO POLYGRAPHISTS HAVE FANGS?
(Or Taking a Bite Out of the Polygraph)

> The study of the phases of the moon, for example, may provide valid scientific "knowledge" about whether a certain night was dark, and if darkness is a fact in issue, the knowledge will assist the trier of fact. However (absent credible grounds supporting such a link), evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night.
>
> *Daubert v. Merrell Dow Pharmaceuticals*,
> 113 S.Ct. 2786 at 2796.

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I. INTRODUCTION

Vampires are the seductive bad boys of folklore, mesmerizing their victims with mystique, magnetism and sophistication. Polygraphs are viewed much the same way. As noted in the oft quoted passage by Justice Darichuk in *R. v. Romansky*:

> [T]he evidence supports the further submission that the psychological tactics employed [the polygraph operator] created an aura of oppression. The will of the accused quickly crumbled with his emotional disintegration. As evidenced by the concomitant amenability and/or responsiveness to suggestions, his will was overcome and overborne by the will of the person in authority. [1]

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[1] *R. v. Romansky* (1981), 6 Man.R.(2d) 408 (CoCt).

One can just imagine a polygraph operator as Dracula, homing in on his victim as they disintegrate under his charms and the mystique of his beguiling machine. However, like all good tales, there is some factual basis behind the creation of these two seemingly unrelated entities and not everything about them should be thrown out like the baby with the bathwater.

In much the same way that Bram Stoker's Dracula was based on the bloodthirsty Romanian general Prince Vlad III the Impaler, the polygraph also has some real life application in criminal trials. Albeit polygraph results are rarely if ever admitted for the truth, the fact a person took a polygraph or offered to take a polygraph may still provide some evidence from which an inference of guilt or innocence may be adduced. This paper will attempt to explore some of these uses.

II. THE DEMON AWAKES

A. Bonifide Investigative Tool

Dating back to the time of Dracula's first appearance on film, the police have been using the polygraph as an investigative tool. [2] While the courts may not receive the results of such tests due to concerns about oath helping, character evidence and unnecessary delay on collateral issues, the Supreme Court of Canada has been clear that polygraphs "*nevertheless continue to be useful for the investigation of offences … [as] these concerns do not preclude police officers from administering polygraph tests as an investigative tool*". [3]

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[2] Dracula first appeared on film in 1922's *Nosferatu*. The modern day polygraph was invented in 1921 by John Augustus Larson (1892-1965) a medical student at the University of California and a police officer of the Berkeley Police Department (Berkeley, California, USA). Dr. Larson, born in Shelbourne, Nova Scotia, was the first to simultaneously record more than one physiological parameter with the purpose of detecting deception. Dr. Larson developed and utilized the continuous method of concurrently registering changes in pulse rate, blood pressure, and respiration. See the International League of Polygraph Examiners, online at: http://www.theilpe.com/faq_eng.html.

[3] *R. v. Trochym*, [2007] 1 S.C.R. 239, at para. 62. Also see *U.S. v. Scheffer*, *op cit* note 29, where Justice Stevens pointed out that the Department of Defense alone had conducted over 400,000 polygraph

In fact, even in *R. v. Béland*, in which a majority of the Supreme Court ruled the polygraph to be inadmissible as a tool to determine or to test the credibility of witnesses in court, it was not because of "*a fear of the inaccuracies of the polygraph*". On that question there was not sufficient evidence to reach a conclusion. However, even if there was a significant percentage of error in polygraph results, the majority held this "*would not by itself be sufficient ground to exclude it as an instrument for use in the courts. Error is inherent in human affairs, scientific or unscientific*." [4]

In this regard, however, the jury is no less equipped to make that decision. As noted by Justice Thomas of the Supreme Court of the United States in *U.S. v. Scheffer* "*[a] fundamental premise of our criminal trial system is that 'the jury is the lie detector.'*" [5]

In deed the jury has traditionally been encouraged to measure the psychophysiological responses exhibited by a witness in determining truthfulness or deception, despite their inaccuracies.

> Covering the face of a witness may impede cross-examination in two ways. First, it limits the trier of fact's ability to assess the demeanour of the witness. Demeanour is relevant to the assessment of the witness's credibility and the reliability of the evidence given by that witness. Second, witnesses do not respond to questions by words alone. Non-verbal communication can provide the cross-examiner with valuable insights. The same words may, depending on the facial expression of the witness, lead the questioner in different directions.

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examinations to resolve issues arising in counterintelligence, security, and criminal investigations between 1981 and 1997.

[4] *R. v. Béland*, [1987] 2 S.C.R. 398, at para. 19 per McIntyre J. (Dickson C.J.C. and Beetz and Le Dain JJ. concurring). LaForest, J concurred in the results only. Wilson and Lamer, JJ dissented, holding that polygraph evidence should be admissible where it is helpful (probative) and relevant.

[5] *U.S. v. Scheffer*, 523 U.S. 303 (1998), per Justice Thomas. However, on this point, he was only speaking for himself and three other justices. Kennedy and three other justices filed an opinion concurring in part and concurring in the judgment, but not on this point, in which they were also joined by Stevens dissenting.

> Mr. Butt, counsel for N.S., makes the valid point that credibility assessments based on demeanour can be unreliable and flat-out wrong. Assessments of credibility based on demeanour can reflect cultural assumptions and biases. Judgments based on demeanour are no substitute for those based on a critical analysis of the substance of the entire evidence. Appellate courts have repeatedly cautioned against relying exclusively or even predominantly on demeanour to determine credibility. Mr. Butt also makes the valid point that the trier of fact does not lose all aspects of demeanour evidence if the witness wears a niqab. The trier of fact will still be able to consider the witness's body language, her eyes, her tone of voice and the manner in which she responds to questions. All are important aspects of demeanour.
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> It is, however, undeniable that the criminal justice system as it presently operates, and as it has operated for centuries, places considerable value on the ability of lawyers and the trier of fact to see the full face of the witness as the witness testifies. Appellate deference is justified to a significant extent on the accepted wisdom that trial judges and juries have an advantage over appeal judges in assessing factual questions because they, unlike appeal judges, have seen and heard the witnesses. Similarly, the principled approach to the admission of hearsay evidence recognizes the value, insofar as the assessment of reliability is concerned, in the trier of fact's ability to observe the witness's demeanour as the witness made a statement which is proffered as evidence of its truth. [6]

Similarly juries have been encouraged to consider a person's post-offence conduct and "*draw its own inferences about the accused's state of mind*". [7] The risk of a jury misusing or being misled by such conduct does not affect its relevance. Such risks can be addressed by an appropriate warning or caution to the jury or excluded where the prejudicial effect outweighs the probative value of the proffered evidence:

> I also agree with Binnie J. that judicial experience has taught us that in some cases jurors have found certain types of evidence more persuasive than warranted, thus making it necessary in appropriate cases to caution the jury accordingly… Likewise, some evidence of post-offence conduct may seem quite suggestive of guilt though, in reality, the conduct is essentially equivocal in nature. For example, evidence that an accused lied to the police about the offence in question may lead jurors to leap too quickly to infer guilt without considering other reasons why he

[6] *R. v. N.S.* (2010), 262 C.C.C. (3d) 4 (Ont. C.A.), paras. 54-56. Leave to appeal SCC granted March 17, 2011 (Docket No. No. 33989).

[7] *R. v. White,* [2011] 1 S.C.R. 433, at para.76 per Rothstein J.

> or she may have lied. A special caution may therefore be required. In some situations, the probative value of the evidence may be slight and far outweighed by its prejudicial effect, in which case it may be best to remove it from the jury's consideration altogether. My colleague Rothstein J. explains how these general principles call for a case-by-case assessment.[8]

Flight, resisting arrest, concealing or destroying evidence, witness tampering, changing appearance, assuming a false name, lying, setting up a false alibi, refusing to cooperate with authorities, suicide attempts, and failing to deny an accusation are different kinds of observable behavior that could support an inference of guilt. [9]

However, as noted by the Supreme Court in *R. v. White and Cote*, 'consciousness of guilt' is simply one inference that may be drawn from an accused's conduct. It is not a special category of evidence and like any piece of circumstantial evidence it must be weighed by the jury, in light of all the evidence, to determine whether it is consistent with guilt and inconsistent with any other rational conclusion – including innocence. [10]

III. THE DEMON RISES

> "The wicked flee, even when no man pursueth;
> *but the righteous are bold as a lion*."
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> Proverbs 28:1 (King James)

A. Post Offence Conduct in Canada

As consciousness of guilt is simply one inference that can be drawn from post-offence conduct, arguably assisting the police in their investigation, remaining at the scene or within the jurisdiction, providing evidence and offering to take a polygraph could be

[8] *Ibid*, para. 106, per Charron, J.

[9] *R. v. White and Cote*, [1998] 2 S.C.R. 72, at para. 19. Also see Andrew Palmer, "*Guilt and the Consciousness of Guilt: The Use of Lies, Flight and Other 'Guilty Behaviour' in the Investigation and Prosecution of Crime*", (1997) 21 Melb. U. L. Rev. 95.

[10] *Ibid*, at para. 20-21.

circumstantial evidence of innocence. This was exactly the issue before the British Columbia Court of Appeal in *R. v. Richards*, [11] handed down a year before the Supreme Court's decision in *White and Cote*.

In *Richards* the accused had wanted the jury to know he had been willingly offered to provide a blood sample and undergo a polygraph examination during the police investigation The information would have been offered as evidence of '*consciousness of innocence'*. While the accused was unable to cite binding authority to support his argument the Court was referred to Wigmore's *Evidence in Trials at Common Law*, where it is said, at vol. II, pp. 230-31:

> If guilt leaves the psychological mark which we term 'consciousness of guilt', and if this is available as evidence … then the absence of that mark (which for want of a better term may be spoken of as "consciousness of innocence") is some indication of the absence of guilt, i.e. of not having done the deed charged. No court seems to repudiate this proposition … but the tendency to reject evidence of a *consciousness of innocence* is rather due to a distrust of the inference from conduct to that consciousness, since the conduct is often feigned and artificial ...
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> Such distrust, however, seems improper. Certainly in the inferences of ordinary life we attach as much weight to that inference as to the inference of consciousness of guilt; the bearing of one accused person as consciously innocent impresses us no less strikingly than the bearing of another as consciously guilty … Let the accused's whole conduct come in; and whether it tells for consciousness of guilt or for consciousness of innocence, let us take it for what it is worth, remembering that in either case it is open to varying explanations and is not to be emphasized. Let us not deprive an innocent person, falsely accused, of the inference which common sense draws from a consciousness of innocence and its natural manifestations. (Emphasis in original)

While the Court ultimately upheld the exclusion of the evidence on the grounds it would have been an exercise in oath helping, they did not foreclose the possibility that "*there may well be cases in which conduct of the accused upon arrest is valuable evidence of*

[11] *R. v. Richards* (1997), 6 C.R. (5th) 154 (B.C.C.A.)

innocence, and where it would be admissible on that basis, as an exception to the general rule." [12]

In reaching its conclusion the Court made a number of observations which had impacted their decision:

1. The offer to provide a blood sample and undergo a polygraph examination was not "upon arrest", so it was not in the same category as a spontaneous exculpatory exclamation upon being confronted with an accusation or evidence of guilt (*res gestae*).

2. The accused did not initiate consideration of the tests in question, but finally gave in to persistent police pressure, and then only grudgingly and with reservations.

3. The accused had considerable experience with the criminal justice system, and may well have been aware that the results of a polygraph test would, in any case, be inadmissible at trial. To the extent that this is probable, it lessens the probative weight of the offer.

4. The accused had no reason to believe blood or other bodily fluids had been left at the crime scene, so the offer to give a sample was similarly riskless.

Only five (5) month later the Ontario Court of Appeal was faced with a similar argument in *R. v. B. (S.C.).* [13] In that case a young woman was severely beaten and sexually assaulted while riding her bicycle down an isolated road. The accused was arrested the following day. He denied the offence and in order to help the police as 'best he could', offered or provided the following:

- Offered and provided various biological samples including blood, saliva, head and pubic hairs and scrapings from underneath his fingernails;

- Offered to take a polygraph test;

[12] *Ibid.,* at para. 25-26.

[13] *R. v. B.(S.C.)* (1997), 119 C.C.C. (3d) 530 (Ont. C.A.)

- Turned over this clothing; and

- Gave a statement denying any involvement in the attack so his defence was identity - not consent;

Unlike *Richards* the accused offered the samples and material upon arrest and before he exercised his right to counsel. He turned the samples over knowing that they would be tested with a view to identifying him as the perpetrator of the offence, and he had no reason to believe that the samples could not assist the police if in fact he was the perpetrator. The accused testified at trial, including the fact he offered to take a "lie detector test". He was acquitted.

The Crown appealed, submitting that the trial judge had erred in admitting the accused's evidence that he had offered to undergo a polygraph test and in using that evidence to bolster his credibility. However the Court of Appeal was not persuaded. While evidence of a prior consistent statement is not admissible because it has very limited probative value, in this case the evidence that an accused offered to take a polygraph test had some probative value "*to the extent that it reasonably yields the inference that the accused was prepared to do something which a guilty person would not be prepared to do*". [14]

While the Court acknowledged that an accused who offers to take a polygraph risks nothing since the results are inadmissible, an inference favourable to the accused from such an offer could still be drawn if, despite the inadmissibility of the results, the accused believed that a negative test result could be used against him at trial. Although there was no evidence of such a belief, looking at the totality of the after-the-fact conduct the Court concluded that the evidence was admissible on a principled basis:

> After-the-fact conduct by an accused which is reasonably capable of supporting an inference adverse to the accused is admissible as long as its probative value

[14] *Ibid,* at para. 28.

> outweighs its prejudicial effect … We see no reason why after-the-fact conduct, which is reasonably capable of supporting an inference favourable to the accused, should not also be received unless its probative value is substantially outweighed by its potential prejudicial effect. We are unaware of any evidentiary rule or theory of relevance which would admit evidence that an accused ran away when confronted by the police as evidence of guilt, but would exclude evidence that an accused effectively turned himself over to the police for whatever investigative purposes they desired, as evidence supporting an inference that the accused did not commit the crime.
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> We also reject the contention that evidence that an accused voluntarily provided samples and other material to the police for forensic testing cannot be admitted on behalf of the accused because it is well known that some guilty people have provided similar samples. This submission is akin to saying that evidence of flight should always be excluded because innocent persons have been known to flee the scene. The fact that the inference favourable to the accused is not the only available inference is no bar to admissibility.
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> The totality of the evidence of the respondent's after-the-fact conduct had some probative value. As a matter of logic and human experience, a trier of fact could conclude that the respondent's conduct after his arrest was inconsistent with that of a person who had committed the crime alleged. [15]

Nevertheless, in holding that the trial judge made no error in law, the Court was clear that this type of evidence should not always be received – noting specifically that the Crown did not initially object and must be taken as a concession that the evidence had some probative value and a further indication that the probative value was not significantly outweighed by any prejudicial effect flowing from the admission of the evidence. [16]

Less than a year later Justice Hill was asked to make a decision on the admissibility of an offer to take a polygraph in *R. v. Sherratt*. While the accused was arrested the day after

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[15] *Ibid,* at para. 35-37.

[16] *Ibid,* at para. 39. However see *R. v. Baltrusaitis* (2002), 162 C.C.C. (3d) 539 (C.A.) at para. 83 where Justice Moldaver (as he then was), affirmed that in appropriate circumstances, a trial judge should draw the jury's attention to after-the-fact conduct consistent with innocence. "*The after-the-fact conduct of the appellant pointing to guilt was weak and to the extent that the trial judge saw fit to leave it with the jury at all, I believe that he should also have drawn the jury's attention to the after-the-fact conduct pointing to innocence*."

the sexual assault, agreed to make a statement and consented to the search of his vehicle, the issue was not identity like *R. v. B.(S.C.)* but consent. In refusing to admit the offer to take a polygraph as evidence of innocence Justice Hill stated:

> I have considered whether this evidence ought to be considered as after-the-fact evidence supporting a consciousness of innocence. In my view, in the particular circumstances of this case, the "offer" to the police to take a polygraph test does not amount to circumstantial evidence pointing away from guilt. I note, that the accused was aware that he was being videotaped at all times including those time periods when he was left on his own in the interview room. Given my view of the totality of the evidence, Mr. Sherratt took these opportunities to stage his self-serving position. [17]

The accused appealed to the Ontario Court of Appeal, however in a short endorsement Justices Doherty, Feldman and Simmons dismissed the appeal stating that the trial judge did not make an error that a finding of consciousness of innocence was not warranted in this case.

> The factors referred to by the appellant relate to the admissibility of evidence of an offer to take a polygraph test, and not to the inference to be drawn from such evidence once admitted. The conclusions reached by the trial judge concerning the proffered evidence of consciousness of innocence were available on the evidence.[18]

A similar conclusion was reached by the Quebec Court of Appeal in *R. v. Simon*, [19] where the accused was intercepted on a wiretap telling his girlfriend that if the police came to arrest him he would take a polygraph to prove his innocence. The conversation was intercepted some three (3) years after the murder he was suspected of and at the time he believed the police were focusing on him as a suspect. The accused was ultimately arrested and at trial he claimed the offer to take a polygraph was evidence of his

[17] *R. v. Sherratt*, [1998] O.T.C. Uned. 289.

[18] *R. v. Sherratt*, [2001], 142 O.A.C. 325. Justice Doherty also penned the decision in *R. v. B.(S.C.).*

[19] *R. v. Simon* (2001), 154 CCC (3d) 562 (Que CA)

innocence. The trial judge refused to put the offer to take a polygraph to the jury. He was subsequently found guilty of first degree murder.

Justices Fish (as he then was), Proloux and Chamberland dismissed the accused's appeal that the offer to take the polygraph should have been put to the jury. While the Court of Appeal agreed with the approach of the Ontario Court of Appeal in *R. v. B.(S.C.)* that there can be cases where a judge may take into account the evidence of an accused's offer to submit to a polygraph test as "consciousness of innocence", this was not such a case:

> The appellant mentions this issue three years after the events, in a telephone conversation with his girlfriend; It is not, for example, of an offer made spontaneously to the police who came to arrest him. Indeed, he has never established, or even sought to establish that he had formally offered the police to take the test at any time whatsoever. [20]

In 2007 the Supreme Court affirmed that the results of a polygraph test could not be received as evidence in court, however Justices Bastarache, Abella and Rothstein, dissenting but not on this point, stated that post-offence conduct can take many forms and can be used for various purposes: For example to support inferences of consciousness of guilt or even to support inferences of innocence (see *R. v. B. (S.C.*) (1997), 36 O.R. (3d) 516 (C.A.)). [21] The test results may be inadmissible; however other inferences may still be drawn from the evidence depending on the circumstances.

B. Consciousness of Innocence in the United States

While rare, the decision in *R. v. B.(S.C.)* is not an anomaly. In fact the State of Wisconsin Evidence Guidelines specifically provides that as with evidence bearing directly on consciousness of guilt, evidence of consciousness of innocence is also relevant. An offer

[20] *Ibid,* at para. 52.

[21] *R. v. Trochym, supra* note 1, at para. 161.

to take a polygraph test or a DNA test is relevant as long as the person offering to take the test believes the test to be possible, accurate, and admissible. [22]

While a polygraph test result is inadmissible in Wisconsin, an offer to take a polygraph test is relevant to an assessment of the offeror's credibility and may be admissible for that purpose. An offer to take a polygraph test is relevant to the state of mind of the person making the offer – so long as the person making the offer believes that the test or analysis is possible, accurate, and admissible. [23]

In *Santana-Lopez,* the defendant told the police that he would take a polygraph and DNA tests. The trial court excluded this evidence, however the Court of Appeal reversed and remanded for the trial court to reconsider the ruling under the following guidelines:

> [A]n offer to take a polygraph test and an offer to undergo a DNA analysis are relevant to the state of mind of the person making the offer – so long as the person making the offer believes that the test or analysis is possible, accurate, and admissible. Simply put, an offer to undergo DNA testing, like an offer to take a polygraph examination, may reflect a consciousness of innocence. As with evidence bearing directly on consciousness of guilt, evidence bearing directly on consciousness of innocence is also relevant. [24]

However the offer must be akin to a spontaneous exculpatory exclamation upon being confronted with an accusation or evidence of guilt. An agreement to submit to a polygraph test *at the request of the accused's attorney,* while constituting an "offer" comes from the accused's attorney – not the accused:

> When the offer to take a polygraph test originates with the defendant and is accompanied by the defendant's belief that the test result or analysis is "possible, accurate, and admissible," it is probative as "consciousness of [the defendant's]

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[22] See s. 901.04 Evidence – General Provisions, Wisconsin Statutes. Online at: http://docs.legis.wisconsin.gov/statutes/statutes/901/04/1.

[23] *State v. Santana-Lopez* (2000), 613 N.W.2d 918 (C.A.)

[24] *Ibid.*

> innocence." The converse does not hold when the offer to take the test is the result of an attorney's suggestion or direction. Any competent defense attorney practicing in Wisconsin well knows that polygraph test results are inadmissible in this state, and presumably the attorney would share that knowledge with the client when suggesting the test. [25]

Similarly an agreement to submit to a polygraph examination at the behest of law enforcement does not constitute an offer to take the test. [26]

In *U.S. v. Scheffer* a United States Air Force serviceman submitted to a urinalysis and a polygraph test. The urinalysis revealed the presence of methamphetamine and the serviceman was court martialed. However the serviceman entered a motion to introduce, in support of his testimony that he had not knowingly ingested drugs, polygraph results of a test administered to him three (3) days after the urinalysis that showed no deception when he denied using drugs. [27]

However, pursuant to Military Rule of Evidence 707 – which made (1) the results of a polygraph test, (2) the opinion of a polygraph examiner, or (3) any reference to an offer to take, failure to take, of taking of a polygraph test inadmissible in court-martial proceedings – denied the motion. On appeal, the United States Court of Appeals for the Armed Forces reversed, holding that a *per se* exclusion of polygraph evidence offered by an accused to rebut an attack on the accused's credibility violated the accused's right, under the Federal Constitution's Sixth Amendment, to present a defense. [28]

The United States Supreme Court reversed, holding that Rule 707 did not abridge the serviceman's constitutional right to present a defense. Nevertheless a plurality of the

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[25] *State v. Pfaff* (2004), 676 N.W.2d 562 (Wisc. C.A.). Also see *State v. Shomberg (*2006), 709 N.W.2d 370 (Wisc. S.C.), aff'ing *State v. Shomberg* (2004), Wisc. Appeal No. 04-0630-CR.

[26] *Ibid.*

[27] S*upra* note 5. Headnote.

[28] *Ibid,* rev'ing *United States v. Scheffer* (1996), 44 MJ 442 (C.A.A.F.)

Court felt that a general *per se* exclusionary rule was either unconstitutional or unwise considering the "*inconsistency between the Government's extensive use of polygraphs to make vital security determinations and the argument it makes here, stressing the inaccuracy of these tests*." [29]

The majority of Justices comprising Kenney, O'Connor, Ginsburg and Breyer also found substantial agreement with Justice Stevens' observation a *per se* argument demeans and mistakes the role and competence of jurors in deciding the factual question of guilt or innocence. As later stated by Justice Stevens:

> It is the function of the jury to make credibility determinations. In my judgment evidence that tends to establish either a consciousness of guilt or a consciousness of innocence may be of assistance to the jury in making such determinations. That also was the opinion of Dean Wigmore:
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> > "Let the accused's whole conduct come in; and whether it tells for consciousness of guilt or for consciousness of innocence, let us take it for what it is worth, remembering that in either case it is open to varying explanations and is not to be emphasized. Let us not deprive an innocent person, falsely accused, of the inference which common sense draws from a consciousness of innocence and its natural manifestations."
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> There is, of course, some risk that some "juries will give excessive weight to the opinions of a polygrapher, clothed as they are in scientific expertise". In my judgment, however, it is much more likely that juries will be guided by the instructions of the trial judge concerning the credibility of expert as well as lay witnesses. The strong presumption that juries will follow the court's instructions, applies to exculpatory as well as inculpatory evidence. Common sense suggests that the testimony of disinterested third parties that is relevant to the jury's credibility determination will assist rather than impair the jury's deliberations. As with the reliance on the potential unreliability of this type of evidence, the reliance on a fear that the average jury is not able to assess the weight of this testimony

[29] *Ibid*, at p. 318. Justice Stevens, citing the Department of Defense Polygraph Program, Annual Polygraph Report to Congress, noted that between 1981 and 1997, the Department of Defense conducted over 400,000 polygraph examinations to resolve issues arising in counterintelligence, security, and criminal investigations.

> reflects a distressing lack of confidence in the intelligence of the average American. [30]

As a result, state and non-military federal courts still retain some discretion in the admission of non-hearsay polygraph examinations. For this reason the sole dissent of Justice Stevens may be the most persuasive:

> Just as flight or other evidence of "consciousness of guilt" may sometimes be relevant, on some occasions evidence of "consciousness of innocence" may also be relevant to the central issue at trial. Both the answers to the questions propounded by the examiner, and the physical manifestations produced by those utterances, were probative of an innocent state of mind shortly after he ingested the drugs. In Dean Wigmore's view, both "conduct" and "utterances" may constitute factual evidence of a "consciousness of innocence." As the Second Circuit has held, when there is a serious factual dispute over the "basic defense [that defendant] was unaware of any criminal wrongdoing," evidence of his innocent state of mind is "critical to a fair adjudication of criminal charges." The exclusion of the test results in this case cannot be fairly equated with a ruling that merely prevented the defendant from encumbering the record with cumulative evidence. Because the Rule may well have affected the outcome of the trial, it unquestionably "infringed upon a weighty interest of the accused." [31]

C. Consciousness of Innocence at the Privy Council

Interestingly there are no English decisions regarding the use of polygraph evidence. However in 1997 the Judicial Committee of the Privy Council, on appeal from Jamaica upheld a Court of Appeal decision that affirmed a Magistrate's decision refusing to admit polygraph results in analogous circumstances to *Scheffer*.

In *Bernal v. The Queen (Jamaica)* [32] the accused had been arrested and convicted for possession of ganja (marijuana), dealing in ganja and taking steps preparatory to the export of ganja, contrary to section 7C of *The Dangerous Drugs Act*. At that time the

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[30] *Ibid*, at p. 336-337.

[31] *Supra*, note 5 at p. 331-332.

[32] *Bernal and Others v. The Queen (Jamaica)*, [1997] UKPC 18 (28th April, 1997), aff'ing *Bernal and Moore v. R* (1996) 50 WIR 296, Jamaica CA.

accused, Brian Bernal, was 20 years old. He was the son of a diplomat who at the relevant time was the Jamaican Ambassador in Washington. Bernal was a student at Howard University in the United States. During spring break he returned to Jamaica and on his return to the United States agreed to take tins of pineapple juice to his friend's sister in Washington for Jamfest. Unfortunately for Bernal the 96 tins of pineapple juice he was transporting contained 43.2 kilograms of compressed ganja.

At trial Bernal claimed he was a dupe and that he had no knowledge the cases contained anything other than pineapple juice. As proof of his innocence Bernal sought to introduce the evidence of a polygraph test. However this evidence was rejected by the Magistrate as encroaching on his judicial function to determine critical issues – namely guilt or innocence.

In the Court of Appeal, Justices Forte and Downer referred to three Commonwealth cases, including *R. v. Béland* from the Supreme Court of Canada. In all three cases the evidence was ruled to be inadmissible. The Court upheld the Magistrates decision as did the Privy Council, also citing the decision in *Béland* that the courts should not generally receive the results of such tests due to concerns about oath helping, character evidence and unnecessary delay on collateral issues. [33] However the Privy Council did not foreclose the possibility that polygraph evidence may be otherwise be admissible in exceptional cases:

> Their Lordships do not find it necessary to express any final conclusion as to whether or not there may be exceptional cases where the evidence of an expert may be admissible to testify as to the results of a polygraph test. The arguments against the admission of such evidence are very formidable. It is sufficient, however, for their Lordships to deal with the facts of the present case. On the evidence before the Resident Magistrate their Lordships are satisfied that the Resident Magistrate was not in error. The evidence before him did not suggest that

[33] *Ibid,* at para. 38.

> polygraph tests were infallible and he was fully entitled to conclude that in the circumstances to admit the evidence would encroach on his judicial function. [34]

Arguably, in the writer's opinion, where cases are decided on the basis of willful blindness or constructive possession, polygraph evidence that the accused was being truthful when he denied any knowledge of the contraband item, may be of no evidentiary value.

IV. THE DEMON FLIES

> Guilt carries Fear always about with it; there is a Tremor in the Blood of a Thief, that, if attended to, would effectually discover him ... but take hold of his Wrist and feel his Pulse, there you will find his Guilt; . . . a fluttering Heart, an unequal Pulse, a sudden Palpitation shall eventually confess he is the Man, in spite of a bold Countenance or a false Tongue.
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> - Daniel Defoe (1730)

A. Admission at Criminal Trials

As we have already seen the courts may not receive the results of polygraph tests at criminal trials. There is one caveat – where the Crown and Defence agree or "stipulate" to it. This recently occurred in the trial of Michael Lynn Pearce who was accused of beating another man to death with a golf club. [35]

As a general rule, in the United States, polygraph results are not admissible in evidence for similar reason to those expressed by the Supreme Court of Canada. Twenty eight (28)

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[34] *Ibid*, at para. 39.

[35] *R. v. Pearce*, 2011 MBQB 99 and *R. v. Pearce*, 2012 MBQB 22. Jurors heard during the trial that Pearce volunteered to take a polygraph test five days before he confessed to killing Stuart Mark. Pearce denied any involvement in the slaying and was deemed by a police polygraphist to have been telling the truth. The polygraph results assisted the Defence in suggesting the confession was false, while the Crown used it to show voluntariness – or that the confession was not as a result of police suggestions, inducements, threats or coercion. Pearce was convicted of Manslaughter on April 12, 2012 and sentenced to 7 years in prison. An appeal of his conviction was filed on September 10, 2012 (Court File No**.** AR12-30-07845).

states currently bar the admission of polygraph evidence outright. Some are driven by precedent, others are statutory prohibitions. For example the *California Evidence Code* makes the use of polygraph evidence *per se* inadmissible:

> Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court, unless all parties stipulate to the admission of such results. [36]

Of the remaining states, eighteen (18) limit the admission of polygraph evidence to cases where both parties stipulate to its use. Only New Mexico allows the admission of polygraph results without stipulation. [37]

A stipulation is a legal document prepared and agreed to by attorney's for both the defense and the prosecution. Admissibility is always however at the discretion of the court. Different rules of evidence apply for the federal and state courts. For example, in Indiana the Courts have adopted four prerequisites that must be met before the results of a polygraph examination can be admitted into evidence. These prerequisites were recently reaffirmed in *State v. Caraway* as follows:

> (1) That the prosecutor, defendant, and defense counsel all sign a written stipulation providing for the defendant's submission to the examination and for the subsequent admission at trial of the results.
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> (2) That notwithstanding the stipulation, the admissibility of the test results is at the trial court's discretion regarding the examiner's qualifications and the test conditions.

[36] *California Evidence Code* s. 351.1(a).

[37] *New Mexico Rule of Evidence 11-707. Polygraph Examinations.* Also see *State v. Dorsey* (1975), 539 P.2d 204 (N.M. Sup Ct) and *Lee v. Martinez* (2004), 96 P.3d 291, at 306-07 (N.M. Sup Ct).

(3) That the opposing party shall have the right to cross-examine the polygraph examiner if his graphs and opinion are offered in evidence; and

(4) That the jury be instructed that, at most, the examiner's testimony tends only to show whether the defendant was being truthful at the time of the examination, and that it is for the jury to determine the weight and effect to be given such testimony. [38]

At the federal level the Court must look at Rule 702 of the Federal Rules of Evidence which governs the admissibility of expert testimony. Additionally to fall within the ambit of Rule 702, the evidence must be relevant in the sense that it will assist the trier of fact to understand the evidence or to determine a fact in issue under Rule 104(a). Finally, the Court must the subject the proffered evidence to the Rule 403 balancing test. Under this rule the court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following:

- unfair prejudice,
- confusing the issues,
- misleading the jury,
- undue delay,
- wasting time, or
- needlessly presenting cumulative evidence. [39]

In *U.S. v. Dominguez*, the Southern District promulgated several factors courts should consider before it determines that the probative value of the test is not substantially outweighed by the danger of unfair prejudice. Specifically, the Court felt the following suggestions are relevant factors:

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[38] *State v. Caraway* (2008), 891 N.E.2d 122, at p. 125 (Ind. C.A.). Also see *State v. Valdez* (1962), 371 P.2d 894 (Ariz. Sup Ct *en banc*), at p. 900-01.

[39] *Federal Rules of Evidence*. A current version of the Rules can be found on the US Courts web site at: http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2011%20Rules/Evidence%20Procedure.pdf

1) That all parties be present to observe the proceedings.

2) That there be a legal commitment irrevocably allowing the admission of the results by both sides.

3) That the subject commits to being examined by any polygraphic expert designated by the other side.

4) When more than one exam is contemplated, the choice of the first examiner take place by chance.

5) That the pre-test interview be allowed by all sides with all sides present.

6) That the post-test interview be allowed by all sides with all sides present.

7) That immediately prior the test the subject be examined for any sedative or drugs in his body.

8) That the rules that do not admit character evidence for truthfulness be legally waived.

9) That no questions be permitted to the mental state of the defendant at the time of the alleged commission of the event.

10) The failure of the Defendant to make himself available to testify in the case should also be a consideration. [40]

However the Court did stress that not all of these factors had to be met before polygraph results could be admitted. However, to avoid a "*legal Pandora's box*" the Court should take into consideration these guidelines in mitigating the unfair prejudice that the polygraph tests can produce. [41]

B. Admission in Warrant Applications

1. Informants and Agents

[40] *US v. Dominguez (1995),* 902 F.Supp. 737, at p. 740 (S.D. Tex).

[41] *Ibid,* at p. 741.

The application for a search warrant is not a trial. Although it is an *ex parte* hearing; hearsay and other evidence that may be inadmissible at trial is acceptable so long as it is adequately sourced.

> The ITO for a search warrant often contains hearsay evidence. This is permissible as long as the evidence is adequately sourced. The officer swearing the ITO might rely upon information from a witness, an accomplice, a fellow police officer, a forensic expert, or an occurrence report. Each of these sources must be identified along with any information bearing on their credibility. This is essential so that the issuing Justice of the Peace can independently assess whether it is safe to rely upon the information presented. [42]

Standing alone the fact that someone passed or failed a polygraph test is not sufficient to establish reasonable grounds for a search. However the results of a polygraph test may be used to buttress reliability and permit reliance on assertions made by a witness or confidential informant. The reviewing judge must consider the "totality of the circumstances" in determining whether there were sufficient grounds to issue the warrant.

When looking at information provided by a confidential informant, the Supreme Court has stated that this "totality of the circumstances" test is driven by the answers to three questions:

1. Is the information (tip) compelling?
2. Is the source credible?
3. Has the tip been corroborated - that is, has the information been confirmed through any independent police investigation or other source? [43]

However, as noted by Justice Wilson a "*weaknesses in one area may, to some extent, be compensated by strengths in the other two*." If the source is anonymous then some

[42] *R. v. K.P.*, 2011 NUCJ 27, at para. 83. Also see *R. v. Future Électronique Inc*. (2000), 151 C.C.C. (3d) 403 (Que C.A.) at p. 412. Appeal quashed as moot [2001] S.C.C.R. No. 82.

[43] *R. v. Debot*, [1989] 2 S.C.R. 1140, per Justice Wilson, affirming the judgment of Martin J., at (1987), 30 CCC (3d) 207 (Ont C.A.).

independent corroboration would be required, but if the source is known and has a good reputation the less need there is for some independent investigation before it can be relied upon. Conversely, if the credibility of the source is at issue then additional corroboration, or some compelling specific detail, would be required. An informant's credibility is commonly established by past instances in which they have given information to police, however it could be established through the use of a polygraph as well.

For example in *State v. Coffey* the Oregon Supreme Court affirmed that an affidavit in support of a search warrant containing a polygraph examiner's opinion regarding an informants reliability, in combination with other facts presented in the affidavit, established probable cause to issue the warrant:

> The polygraph examiner's interpretation of the data produced by the polygraph is one quantum of information (or "fact") that "bears on" the unnamed informant's reliability. A polygraph examiner's opinion as to deception or lack thereof will tend to show the informant's information to be unreliable or reliable. In this case, the informant reported seeing cocaine in defendant's apartment; the polygraph examiner's opinion supports a conclusion that the informant spoke without deception upon conveying this information. The opinion of the polygraph examiner is thus a fact bearing on the reliability of the informant's information and is, accordingly, a fact bearing on his or her reliability. [44]

A similar conclusion was reached in *State v. Fink*. Besides the less rigorous standards that govern the admissibility or weight of evidence at trial, the Court of Appeal also indicated the fear that a jury overestimating the value of polygraph evidence was also absent in the context of a magistrate considering a search warrant application.

> The concerns militating against the use of polygraph evidence in criminal trials are not present in the context of a magistrate's decision whether to issue a search warrant. The magistrate is presumably aware of the controversy surrounding polygraphy and is hence less likely than a jury to be overwhelmed by the results of a polygraph test … Other courts have relied on the results of a polygraph test as a factor which may be used to establish an informant's credibility. The authors of

[44] *State v. Coffey* (1990), 788 P.2d 424 (Oregon Sup Ct), at p. 426, aff'ing 764 P.2d 605 (C.A.).

> one empirical study specifically addressing the issue concluded that the polygraph can be a useful tool in evaluating information from police informants. [45]

Also see *R. v. Pires & Lising* in which a Crown agent was asked to undergo a polygraph exam to establish his truthfulness prior to the police acting on his information and using him to gather information against a criminal organization pursuant to a one-party consent wiretap. At trial the defense sought to cross examine the affiant as he had sworn the agent (Molsberry) was being "*completely truthful in his dealings with the police in this investigation*", whereas the polygraph has only been given to determine whether he (Molsberry) was a "double agent" and not to determine whether he had been completely truthful in his dealings with the police. The application was dismissed.

> Regardless of the inherent limitations of polygraph testing, the polygraph results were relevant to the material issue – it formed part of the grounds advanced for believing that Molsberry was a reliable informant. However, there was no need to cross-examine Detective Richards to find out more about the polygraph test. The polygraph results, including the transcript of the pre-test examination, were disclosed to the defence and were put before the reviewing judge for his consideration. There was no reasonable likelihood that cross-examination of Detective Richards on the information he received about the polygraph results would elucidate anything further of any probative value. [46]

2. Suspects and Accused

Just as a positive polygraph result can be used to support or enhance a witness's credibility, a similar negative finding can be used to draw an adverse inference about a person being targeted by the police. For example in *State v. Henry* the police used the fact that Henry had failed a polygraph as one of their grounds to obtain a search warrant for blood and hair samples. Henry moved to suppress the evidence from the blood and hair

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[45] *State v. Fink* (1986), 720 P2d 372 (Oregon C.A.), at p. 375. *Rev. den.* (1986), 726 P.2d 935 (Oregon Sup. Ct.). Internal citations omitted. Also see Blum, R. H., and Osterloh, W., "*The Polygraph Examination as a Means for Detecting Truth and Falsehood in Stories Presented By Police Informants*" (1968), 59 J.Crim.L., Criminology & Police Sci. 133.

[46] *R. v. Pires; R. v. Lising*, [2005] 3 S.C.R. 343, at para. 67, aff'ing 2004 BCCA 33, upholding the accused's convictions on conspiracy and drug related charges.

seized during the execution of the search warrant, alleging the affidavit lacked a sufficient basis to find probable cause, was based on uncorroborated hearsay and inadmissible polygraph evidence. However the Supreme Court of Kansas held otherwise:

> Henry also alleges that statements regarding the polygraph test should not have been included in the affidavit for the search warrant, as such tests are inadmissible at trial. This issue is not the same as whether such tests are admissible at trial, where we are concerned that polygraph tests will invade the province of the jury. The unreliability of polygraph tests remains a consideration, although in this case the test results were not a determining ground for the search warrant application. When deciding if the totality of the circumstances supports a finding of probable cause, inclusion of facts pertaining to a polygraph test will not invalidate the issuance of a search warrant. [47]

3. Arrest Warrants

Arrest warrants are no different. The results of a polygraph are generally inadmissible at trial as evidence to determine guilt. Nonetheless officers may submit warrant applications containing hearsay and information provided by other officers that is normally inadmissible at criminal trials. In *Bennett v. City of Grande Prairie* the police had included a statement that the suspect's performance on a polygraph test was "poor", stating that she "*had shown deception ... when questioned about [her] knowledge of who committed the offense and if she was involved*." [48]

The Court accepted the proposition that polygraphs correctly detect truth or deception 80 to 90 percent of the time. As such they saw no reason to create a per se rule barring magistrates, who may already consider information like hearsay, from using their discretion to evaluate the results of polygraph exams, in conjunction with other evidence, when determining whether probable cause exists to issue an arrest warrant.

> The fear that a jury may overestimate the probative value of such evidence when

[47] *State v. Henry* (1997), 947 P.2d 1020 (Kan. Sup Ct). Also see *State v. Clark* (2001), 24 P.3d 1006 (Wash Sup. Ct.), at p. 1015. *Cert. denied* (2001) 534 U.S. 1000. Internal citations omitted.

[48] *Bennett v. City of Grande Prairie* (1989), 883 F.2d 400 (5th Cir CA).

> considering an individual's guilt or innocence – the factor that led some courts to preclude and other courts to limit the use of polygraph exams as evidence at trial – is absent when a magistrate relies on such an exam to determine whether there is probable cause to issue an arrest warrant. Unlike a lay jury, a magistrate possesses legal expertise; when determining probable cause, he is unlikely to be intimidated by claims of scientific authority into assigning an inappropriate evidentiary value to a polygraph report or to rely excessively on it.
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> A magistrate, moreover, may determine probable cause from evidence inadmissible at trial to determine guilt. The preliminary nature of the probable cause determination, as well as the magistrate's expertise in evaluating the evidence to reach that decision, permits the issuance of an arrest warrant on "much less evidence" than is required to convict an individual. Thus, "probable cause may be founded upon hearsay" or "upon information received from informants" – evidence circumscribed at trial – if "the information put forth is believed or appropriately accepted by the affiant as true." [49]

C. Admission at Bail Hearings

Similar to applications for a warrant, a bail hearing is not a trial. While there is some debate about what evidence can and should be called, the rules of evidence and the burden of proof is somewhat relaxed:

> The rules of evidence applicable to a trial do not apply to judicial interim release hearings. These proceedings by their very nature must in most cases be conducted summarily and on short notice. If the rigid procedures of a trial have to be met, the result will be delay, inconvenience, and additional expense, and the spirit and intent of the bail provisions will be defeated. Hearsay evidence can be considered if it is reliable and trustworthy, but the parties must have the opportunity to contradict or challenge such evidence. The only question is the weight to be given to the hearsay evidence considered on summary applications, not whether such evidence is admissible. [50]

Sections 518(1) of the Criminal Code sets out the material on which a justice may base their decision when granting or denying bail, including evidence the justice considers

[49] *Ibid*, at para. 31.

[50] *R. v. Wilson (E.)* (1997), 160 Sask.R. 47 (QB), at para. 16(4). Citing *R. v. Powers* (1972), 9 C.C.C. (2d) 533 (Ont H.C.) and *R. v. Zeolkowski* (1989), 58 Man.R.(2d) 63 (SCC).

"*credible or trustworthy by him in the circumstances of each case*". [51] This includes evidence that is ordinarily inadmissible at trial. [52]

While there is a lack of case law on point in Canada, in *U.S. v. Bellomo*, the court held that a polygraph test could be considered by the court in determining pretrial detention. In this case the accused, on charge for murder, proffered the evidence of two polygraph examiners, who would state that Bellomo, a member of the Genovese crime family, was being truthful in denying, under polygraph examination, his involvement in the murder.

The Court agreed that polygraph evidence is properly considered on a bail application, notwithstanding its long established inadmissibility in criminal trials but "*because the rules of evidence do not apply in detention hearings under the Bail Reform Act*". However based on the nature and seriousness of the charges and the strength of the government's case, flight from prosecution was the biggest risk – not whether Bellomo was innocent or not:

> Although it fails as a rebuttal to the government's showing that Bellomo is a flight risk, polygraph evidence in theory might be relevant also to the determination of whether Bellomo is a danger to the community. The Court has considered the polygraph evidence, to the extent it believes is appropriate, in regard to this issue as well. However, it does not think the evidence is entitled to much weight. [53]

Arguably, in any hearing that is conducted by a judge alone, including those within the exclusive jurisdiction of a provincial court judge, there is less concern that polygraph evidence will hoodwink or beguile the trier of fact who must decide the case on its merits. As noted earlier in *State v. Fink* a judge is "*is presumably aware of the*

[51] *Criminal Code*, R.S.C. 1985, c. C-46, s. 518(1)(e).

[52] *Supra*, note 50.

[53] *U.S. v. Bellomo* (1996), 944 F.Supp. 1160 (S.D.N.Y.), at p. 1164.

controversy surrounding polygraphy and is hence less likely than a jury to be overwhelmed by the results of a polygraph test …". [54]

D. Admission at Sentencing

The rules to be followed at a sentencing hearing are outlined in Part XXIII the *Criminal Code* of Canada. Unlike at a trial the judge has a considerable range of sources and types of information available to him. As noted by Justice Dickson in *R. v. Gardiner* …

> One of the hardest tasks confronting a trial judge is sentencing. The stakes are high for society and for the individual. Sentencing is the critical stage of the criminal justice system, and it is manifest that the judge should not be denied an opportunity to obtain relevant information by the imposition of all the restrictive evidential rules common to a trial. Yet the obtaining and weighing of such evidence should be fair. A substantial liberty interest of the offender is involved and the information obtained should be accurate and reliable.
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> It is a commonplace that the strict rules which govern at trial do not apply at a sentencing hearing and it would be undesirable to have the formalities and technicalities characteristic of the normal adversary proceeding prevail. The hearsay rule does not govern the sentencing hearing. Hearsay evidence may be accepted where found to be credible and trustworthy. The judge traditionally has had wide latitude as to the sources and types of evidence upon which to base his sentence. He must have the fullest possible information concerning the background of the accused if he is to fit the sentence to the offender rather than to the crime. [55]

In addition s. 726.1 of *the Criminal Code* specifically directs that when determining the appropriate sentence the court "*shall consider any relevant information placed before it, including any representations or submissions made by or on behalf of the prosecutor or the offender*". [56]

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[54] *Supra*, note 45.

[55] *R. v. Gardiner*, [1982] 2 S.C.R. 368, at p. 414.

[56] *Supra*, note 51, s. 726.1 (S.C. 1995, c. 22, s. 6). Also see s. 721(4) regarding pre-sentence reports (PSR) by a probation officer which shall also contain "*information on any other matter required by the court, after hearing argument from the prosecutor and the offender …*".

While there is a lack of case law on point in Canada, in *United States v. Jordan* the 9th Circuit held the admission of polygraph evidence at sentencing is within the discretion of the trial judge. [57]

The Georgia Supreme Court also reached a similar conclusion with respect to a death penalty case, stating "*Georgia's general ban on the admission of polygraph test results absent the parties' stipulation should not be applied automatically in the sentencing phase of a capital case so as to prevent the defendant from presenting a favorable polygraph test result*", but cautioned that the trial court still had discretion to refuse any evidence it determined to be unreliable. [58] Nevertheless, there have only been a handful of cases in the United States that have considered polygraph results during the sentencing phase.

Arguably, in a case of deemed or constructive possession like *R. v. Bernal* (*supra*, note 32) such evidence may go to mitigation (as opposed to guilt or innocence) where the accused claims he did not know he was couriering drugs or that an accomplice was in possession of an illegal item. Such evidence was proffered by the defence in *U.S. v. Messina*, however the trial judge ruled the test results were "*flat out wrong*" (i.e. he disbelieved the accused had no knowledge of the kidnapping). On review the Court of Appeal affirmed the trial judge's decision to reject the evidence but reached their decision without having to decide the "*question of whether the district judge would have been entitled to rely on the polygraph evidence for sentencing purposes if he had found it to be credible*". [59]

E. Probation Orders

[57] *U.S. v. Jordan* (2001), 256 F.3d 922 (9th Cir CA), at p. 933, n.7.
[58] *Height v. State* (2004), 604 S.E.2d 796 (Ga. Sup Ct), at p. 798-99.
[59] *U.S. v. Messina* (1997), 131 F.3d 36 (2nd Cir CA) at para. 38.

In *R. v. Shoker* the Supreme Court of Canada affirmed that "*a sentencing judge has a broad jurisdiction in determining appropriate conditions of probation*." Indeed s. 732.1(3)(h) of the *Criminal Code* provides that when crafting a probation order the court may prescribe such "*reasonable conditions as the court considers desirable … for protecting society and for facilitating the offender's successful reintegration into the community*". However such conditions must not be used to punish the offender – they cannot be used to gather evidence for enforcement purposes. [60]

As such a probation order could be crafted to include a condition that a probationer or parolee submit to a polygraph test; however the results of such a test could not be used to collect evidence for the purpose of prosecution. Again, there is a lack of case law on point and it appears its use in Canada is limited. As noted in a summary of the Canadian findings of the 2009 Safer Society Survey: Current Practices and Emerging Trends in Sexual Abuser Management, the authors reported that "*polygraph testing to verify treatment and supervision compliance is not common in Canada. In the United States this practice is common, and data indicates the practice continues to increase*." [61]

For example in *U.S. v. Lumley*, the Kansas Supreme Court held as a fact that the courts of other jurisdictions are virtually unanimous in approving the requirement of polygraph examinations as a condition of probation, especially in sexual assault cases. Where the jurisdictions disagreed, the court noted, was in whether the polygraph examination results were admissible against the probationer in a probation revocation hearing.

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[60] *R. v. Shoker*, [2006] 2 S.C.R. 399, at para. 3. As a result of this decision Parliament passed the "*Shoker Act*" (Bill C-30) in 2011, amending the *Criminal Code* to allow a court to require that an offender provide a sample of a bodily substance on the demand of peace officers, or at regular intervals, in order to enforce compliance with a prohibition on consuming drugs or alcohol imposed in a probation order (S.C. 2011, c. 7, proclaimed in force March 23, 2011).

[61] McGrath, R., Cumming, G., Burchard, B., Zeoli, S., & Ellerby, L. (2010) *Current Practices and Emerging Trends in Sexual Abuser Management: The Safer Society 2009 North American Survey.* Brandon, Vermont: Safer Society Press.

Like bail and sentencing hearings, the court held that probation revocation hearings are not criminal trials, and there are significant differences as to a defendant's rights and the admission of evidence. In explaining the rational for such conditions, at least in Lumley's case, was the inability of probation officers to monitor him 24-hours a day.

> Lumley pled guilty to a sex crime committed upon young females. One condition of probation was that he not be alone with young females. As indicated at sentencing, compliance with that condition is difficult to enforce. The polygraph condition helped to monitor compliance and was therefore reasonably related to the defendant's criminal offense. Because this condition was aimed at deterring and discovering criminal conduct most likely to occur during unsupervised contact with young females, the condition was reasonably related to future criminality. The relaxed standard of proof and the fact that a probation revocation decision is a judicial decision rather than a jury decision are additional factors that strongly support a determination that polygraph test results are sufficiently reliable to be considered evidence in probation revocation hearings. [62]

V. CONCLUSION

> "Villains!" I shrieked, "dissemble no more! I admit the deed! – tear up the planks! – here, here! – it is the beating of his hideous heart!"
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> A Tell-Tale Heart (1843) Edgar Allan Poe

Law enforcement and intelligence agencies in the United States and Canada are the biggest users of the polygraph for investigative purposes. While the results are generally inadmissible at criminal trials, they may still be used in court for a limited number of other purposes. However, like any other piece of circumstantial evidence the results should be used with care and NOT looked at in isolation. While we should be cautious not to be seduced by the aura and mystique of the polygraph, the psychophysiological

[62] *U.S. v. Lumley* (1999), 977 P.2d 914 (Kan. Sup. Ct.), referencing Annotation, "*Propriety of Conditioning Probation on Defendant's Submission to Polygraph or other Lie Detector Testing*" (1991), 86 A.L.R.4th 709. Also see Jan Hindman & James M. Peters, "*Polygraph Testing of Sex Offenders*" (2001), 65(3) Federal Probation 8.

responses it is measuring have been known since Biblical times and in the folklore of the English language.