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prove to be the test phrase of that decision. The Court stated that in *Caban* they were rejecting the notion that a "broad, gender-based distinction . . . is required by any universal difference between maternal and paternal relations at every phase of a child's development."⁷⁷ The qualifier, "at every phase of a child's development," may well indicate the Court's reticence to grant many unwed fathers an equal voice in adoption proceedings.

RONALD R. HOFER

CRIMINAL PROCEDURE — Polygraph Evidence — Impeachment of Polygraph Examiner Testimony by Defense Experts Allowed at Admissibility Hearing. *McLemore v. State*, 87 Wis. 2d 739, 275 N.W.2d 692 (1979). In *McLemore v. State*,¹ the Wisconsin Supreme Court held that, where a criminal defendant has stipulated to take a polygraph examination and the state has moved that those results and the testimony of the examiner be admitted into evidence, the defendant is entitled to present his own experts at the admissibility hearing, out of the presence of the jury, to impeach the testimony of the polygraph examiner and the results of the examination.

The question of whether a defendant can present his own experts to testify against the polygraph examiner was first considered in *State v. Mendoza*.² The court, reversing and remanding on other grounds, there held that the "defendant's expert witnesses may testify before the trial judge at a new admissibil-

77. 99 S. Ct. at 1754 (citing *Caban v. Mohammed*, 99 S. Ct. 1760, 1767 (1979)) (emphasis added).

EDITOR'S NOTE: After this article was prepared for publication the Wisconsin Court of Appeals was faced with the issue of whether section 956.71 of the Wisconsin statutes was unconstitutional because it categorizes fathers of children born out of wedlock and not legitimated as not being a "parent" within the meaning of this custody statute. In upholding the statute, the Wisconsin Appeals Court echoed many of the dissenting arguments in *Caban*. The court stated the interests of the state in protecting minor children were substantial reasons for distinguishing the class. See *State v. Hill*, 91 Wis. 2d 446, 283 N.W.2d 451 (Ct. App. 1979).

1. 87 Wis. 2d 739, 275 N.W.2d 692 (1979).

2. 80 Wis. 2d 122, 258 N.W.2d 260 (1977).

ity hearing preceding the new trial."³ However, it was not clear whether that language was limited to the facts of *Mendoza*. Moreover, the exact nature and scope of the defendant's right to impeach was left undefined by *Mendoza*.

McLemore clearly delineates the defendant's right to call his own experts. In addition, *McLemore* raises two other very important questions with regard to polygraph evidence: (1) should testimony of defense experts be admissible at trial, before the jury, to impeach the examiner's opinion; and (2) should *State v. Stanislawski*⁴ be overruled, thereby prohibiting the admissibility of any polygraph evidence at criminal trials? These two questions, and the scope and nature of a defendant's right to impeach the testimony of the examiner, will be addressed by this note.

I. BACKGROUND

The polygraph is a pneumatically operated, multipenned instrument, which mechanically records blood pressure, pulse, respiration, galvanic skin response and, in some cases, gross muscular movement.⁵ Simply stated, the theory behind polygraphy is that a person's fear of detection, when being intentionally deceptive, manifests itself in certain physiological responses⁶ which are recorded by the polygraph and interpreted by the examiner. The polygraph examiner asks the suspect certain questions, records the suspect's answers, and interprets the correlating polygrams to determine if the suspect has given any deceptive responses.

Until *State v. Stanislawski*⁷ was decided in 1974, the results of polygraph examinations taken by criminal defendants, and the polygraph examiner's interpretive testimony, were inadmissible in all cases.⁸ The Wisconsin Supreme Court in *State*

3. 80 Wis. 2d at 162, 258 N.W.2d at 277. A new trial was ordered because of error in jury instructions and improper change of venue.

4. 62 Wis. 2d 730, 216 N.W.2d 8 (1974).

5. J. REID & F. INBAU, TRUTH AND DECEPTION: THE POLYGRAPH ("LIE-DETECTOR") TECHNIQUE 5 (2d ed. 1977) [hereinafter cited as REID & INBAU]. See Wilner, *Polygraphy: Short Circuit to Truth?* 29 U. FLA. L. REV. 286 n.1 (1977).

6. Orne, *Implications of Laboratory Research for the Detection of Deception*, 2 POLYGRAPH 169, 194-95 (1973), quoted in *Lhost v. State*, 85 Wis. 2d 620, 642-43, 271 N.W.2d 121, 131-32 (1978).

7. 62 Wis. 2d 730, 216 N.W.2d 8 (1974).

8. See, e.g., *State v. Nemoir*, 62 Wis. 2d 206, 214 N.W.2d 297 (1974).

*v. Bohner*⁹ adopted the absolute inadmissibility position espoused in *Frye v. United States*¹⁰ and adhered to it for more than forty years.¹¹ Then in *Stanislawski* the court rejected the rationale of *Bohner* and adopted the Arizona position on polygraph evidence, which had been enunciated in *State v. Valdez*.¹²

Stanislawski held that expert opinion evidence as to polygraph examinations may be admitted in criminal cases to corroborate other evidence of a defendant's participation in the crime charged, and, if the defendant takes the stand, such evidence may be admitted to corroborate or impeach his own testimony.¹³ Furthermore, *Stanislawski* made the admissibility of polygraph evidence subject to four conditions:

First, the district attorney, defendant, and defense counsel must all sign a written stipulation providing for defendant's submission to the test, and for the admission at trial of the graphs, and the examiner's opinion on behalf of either the defendant or the state. Second, notwithstanding the stipulation, the admissibility of the test results is subject to the discretion of the trial judge, that is, if the trial judge is not convinced that the examiner is qualified or that the test was conducted under proper circumstances he may refuse to accept such evidence. Third, if the graphs and examiner's opinion are offered in evidence, the opposing party has the right to cross-examine the examiner about: his qualifications and training; the conditions under which the test was administered; the limitations of and possibilities for error in the technique of polygraphic interrogation; and, at the discretion of the trial court, any other matters deemed pertinent to the inquiry. Finally, if the evidence is admitted, the trial judge should instruct the jury that the examiner's testimony does not tend to prove or disprove any element of the crime with which a defendant is charged but at most tends only to indicate whether at the time of the examination the defendant

9. 210 Wis. 651, 246 N.W. 314 (1933).

10. 293 F. 1013 (D.C. Cir. 1923). In *Frye* the court held that "the systolic blood pressure deception test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made. *Id.* at 1014.

11. *E.g.*, *Gaddis v. State*, 63 Wis. 2d 120, 216 N.W.2d 527 (1974); *State v. Nemoir*, 62 Wis. 2d 206, 214 N.W.2d 297 (1974).

12. 91 Ariz. 274, 371 P.2d 894 (1962) (en banc).

13. 62 Wis. 2d at 742, 216 N.W.2d at 14.

was telling the truth. The jury members should also be instructed that it is for them to determine what corroborative weight and effect such testimony should be given.¹⁴

In *State v. Mendoza* the court clarified the second condition of *Stanislawski*, holding that the trial court must conduct its "judicial inquiry" out of the presence of the jury, in a "hearing on admissibility" of polygraph evidence.¹⁵

Of those courts which admit polygraph examination results and testimony into evidence, only a limited number do not require a stipulation as a condition of admissibility.¹⁶ In *Lhost v. State*, Wisconsin reaffirmed its position that, absent a *Stanislawski* stipulation, polygraph evidence is not admissible in a criminal trial.¹⁷

The training of polygraph examiners has become increasingly standardized. Expanded training programs and stricter entrance requirements into schools and professional organizations have been developed recently. Advances have occurred in both instrumentation and technique.¹⁸ Some states require that polygraph examiners be licensed to practice, and require varying degrees of experience and training.¹⁹ Wisconsin, however, has no polygraph licensing statute, and any person who purports to be a polygraph examiner may practice as one. In the future, regulation of training and procedure, and state licensing of polygraph examiners in Wisconsin, may help to alleviate some of the problems illustrated by the discussion of *McLemore* below.

II. *McLemore v. State*

The defendant was charged with armed robbery of a gasoline station in violation of sections 943.32(1)(b) and (2) of the 1973 Wisconsin statutes. Before trial, and pursuant to a stipulation between defense counsel and the assistant district attor-

14. *McLemore v. State*, 87 Wis. 2d 739, 747, 275 N.W.2d 692, 696 (1979)(paraphrasing *State v. Stanislawski*, 62 Wis. 2d 730, 742-43, 216 N.W.2d 8, 14 (1974)).

15. 80 Wis. 2d at 161, 258 N.W.2d at 277.

16. *Lhost v. State*, 85 Wis. 2d 620, 639, 271 N.W.2d 121, 130 (1978). See also *Commonwealth v. A Juvenile* (No. 1), 365 Mass. 421, 313 N.E.2d 120 (1974); *State v. Dorsey*, 87 N.M. 323, 532 P.2d 912 (1975).

17. 85 Wis. 2d 620, 271 N.W.2d 121 (1978).

18. *Abrams, Polygraphy Today*, 3 NAT'L J. CRIM. DEF. 85, 87 (1977).

19. *E.g.*, ILL. ANN. STAT. ch. 111, § 2412 (Smith-Hurd 1978); MICH. COMP. LAWS ANN. § 338.1710 (1976).

ney, the defendant submitted to a polygraph examination. The examination was administered by Robert L. Anderson, a polygraph examiner for the Wisconsin State Crime Laboratory in Madison. At trial, the state called Mr. Anderson to the stand. A hearing was held, outside the presence of the jury, at which the court permitted examination regarding Mr. Anderson's qualifications as a polygraph examiner.²⁰

Defense counsel then made an offer of proof that two defense experts would testify that (1) the scoring of the defendant's test followed no recognized or approved procedure; (2) the test questions asked the defendant were improper; and (3) the results of independent polygraph examinations conducted by defense experts were inconclusive and did not show the defendant to be deceptive.²¹ The trial court said the defense could cross-examine Anderson before the jury, but denied the defense motion to put on its experts to rebut Anderson's conclusions and qualifications.

Anderson was then called to testify in the presence of the jury. He reiterated his testimony about his training and qualifications.²² Anderson then opined that based on polygraph examination the defendant was not telling the truth when he denied robbing the gasoline station.

20. Anderson testified that he is a polygraph examiner at the State Crime Laboratory, and that he has been a polygraph examiner since 1968 when he finished the federal school at Augusta, Georgia. Before his present job, Mr. Anderson testified that he had conducted more than 800 polygraph examinations while he was in the Army. He added, that he had no way of knowing how many of these examinations resulted in the actual taking of the polygram. He testified that he had conducted more than 600 polygraph tests at the State Crime Laboratory. He stated that he was a member of the American Polygraph Association (APA), the Wisconsin Polygraph Association, and the Wisconsin Law Enforcement Association.

Anderson stated he was placed on probation status with the APA, following a hearing on charges brought against him. He stated that because of his role in the Mendoza trial . . . , Robert Brisentine of the American Polygraph Association filed charges against him. Brisentine alleged at the APA hearing that Anderson had misinterpreted the charts in the Mendoza case, that the procedure Anderson used for arriving at his conclusions was contrary to any recognized teaching of an APA accredited school, and that the procedure used by Anderson was not taught by the Army. He was still on APA probation at the time of this trial.

87 Wis. 2d at 744-45, 275 N.W.2d at 694-95 (citations omitted).

21. Brief of Plaintiff in Error at 21, Brief of Defendant in Error at 3-4, *McLemore v. State*, 87 Wis. 2d 739, 275 N.W.2d 692 (1979).

22. Anderson's testimony included the circumstances surrounding his probationary status with the American Polygraph Association. *Id.* at 746, 275 N.W.2d at 695.

The jury found the defendant guilty, and judgment was entered convicting the defendant of one count of armed robbery contrary to sections 943.32(1)(b) and (2) of the 1973 Wisconsin statutes. The defendant appealed the conviction, claiming, *inter alia*, that the trial court's refusal to allow the use of defense experts' rebuttal testimony at the *voir dire* examination of Anderson and at trial constituted error in that the defendant was denied the right to a fair trial and an opportunity to confront and cross-examine witnesses.²³

The supreme court, in an opinion written by Justice Day, held that the defendant was entitled to introduce expert testimony to impeach the examiner in the admissibility hearing, out of the presence of the jury, challenging the methods and techniques used in the examination. The court further held that this right to impeach the examiner was not subject to the discretion of the trial court, and the refusal by the trial court to allow the defense to exercise this right was error requiring reversal and a new trial.²⁴

III. INTERPRETATION AND CRITIQUE

A. McLemore and its Impact

It is interesting to note that the *Mendoza* case is cited by *McLemore* as deciding the question of whether a defendant who stipulates to the admission of an examiner's opinion is entitled to call his own expert witnesses to rebut that opinion.²⁵ Close analysis of the *Mendoza* opinion, however, shows that the court there did not decide that question. Rather, all that the *Mendoza* case stated was that the defendant's experts could testify at a new admissibility hearing preceding defendant's new trial.²⁶ *Mendoza* did not state that this holding was to be

23. The issue on appeal, as stated by the supreme court, was: "[w]as the defendant denied the right to cross-examination, impeachment, and the right to call witnesses in his own behalf when the trial court refused to allow him to call his own polygraph experts to testify as to procedures used by the state's polygraph examiner?" *Id.* at 742, 275 N.W.2d at 693-94.

24. *Id.* at 749, 275 N.W.2d at 697.

25. *Id.* at 747, 275 N.W.2d at 696 (citing *State v. Mendoza*, 80 Wis. 2d 122, 258 N.W.2d 260 (1977)).

26. See text accompanying note 3 *supra*. As stated above, the *Mendoza* court reversed and remanded on other grounds. Specifically, the trial court erred in ordering a change of the place of trial sua sponte over defendant's timely objection. As to the admissibility of testimony of defendant's polygraph experts, the court made only the following limited holding:

of general application to all polygraph evidence, and it did not make clear the nature of the "right" it had made available to that particular defendant.

In contrast, *McLemore*²⁷ clearly explicates the scope and nature of a defendant's right to call his own expert witnesses: (1) The purported rule of *Mendoza*, *i.e.*, that the defense may present its own experts to impeach the agreed-upon polygraph examiner at the admissibility hearing, is to be of general application to all criminal cases involving a *Stanislawski* stipulation;²⁸ (2) A defendant is entitled, as a matter of right, to call his own expert witnesses at the admissibility hearing to impeach the methods and techniques used in the examination of the defendant;²⁹ (3) This right is not subject to the discretion of the trial court;³⁰ and (4) Refusal to permit defendant's experts to testify at the *voir dire* is reversible error.³¹

The holding in *McLemore* was an important and necessary step in the evolution of polygraph evidence admissibility in Wisconsin. It is well recognized that the polygraph examiner is the most important element of any polygraph examination.³² It is the individual examiner's subjective interpretation of the polygraph charts which produces an opinion as to the truth or falsity of the defendant's responses to the examiner's ques-

A majority of this court holds that the trial court did not abuse its discretion in refusing to allow defendant's experts to testify before the jury . . . Finally, the court holds that defendant's expert witnesses *may* testify before the trial judge at a new admissibility hearing preceding the new trial but that such hearing need not be held if, prior to such hearing, the state and the defendant mutually withdraw the stipulation to admission of the polygraph evidence.

State v. Mendoza, 80 Wis. 2d 122, 162, 258 N.W.2d 260, 277 (1977) (emphasis added).

From the above statement, it is not clear (1) whether the court's holding regarding testimony of defense polygraph experts is to be of general applicability to all criminal cases involving polygraph evidence; (2) whether defendants, as a matter of right, may introduce rebuttal polygraph testimony at the admissibility hearing; and (3) what the nature of the "right," if any, to introduce such testimony is.

27. 87 Wis. 2d at 749, 275 N.W.2d at 697.

28. "*Stanislawski* left unanswered the question of whether a defendant who stipulates to the admission of an examiner's opinion is nevertheless entitled to call his own expert witnesses to rebut that opinion. That question was decided in *State v. Mendoza*, 80 Wis. 2d 122, 258 N.W.2d 260 (1977)." *McLemore v. State*, 87 Wis. 2d 739, 747, 275 N.W.2d 692, 696 (1979).

29. "[T]he defense was *entitled* to put on its experts to impeach Anderson in the admissibility hearing . . ." *Id.* at 749, 275 N.W.2d at 697 (emphasis added).

30. *Id.*

31. *Id.*

32. See REID & INBAU, *supra* note 5, at 5.

tions.³³ In addition, “[w]hen polygraph evidence is offered in evidence at trial, it is likely to be shrouded with an aura of near infallibility.”³⁴ Present day jurors are “likely to give significant, if not conclusive, weight to a polygraphist’s opinion as to whether the defendant is being truthful or deceitful in his response to a question bearing on a dispositive issue in a criminal case.”³⁵

Given the one-sided nature and effect of polygraph evidence against a defendant,³⁶ in order for the defendant to have a fair trial, it is imperative that at some point in the trial process the defendant be given an opportunity to confront the polygraph expert testifying against him.³⁷ *Stanislawski* provides the right of cross-examination as one means of confronting the poly-

33. *McLemore v. State*, 87 Wis. 2d 739, 749-50, 275 N.W.2d 692, 697 (1979) (citing *Abbell, Polygraph Evidence: The Case Against Admissibility in Federal Criminal Trials*, 15 AM. CRIM. L. REV. 29, 40, 41 (1977)). (This portion of the majority opinion reflects the views of Justices Day, Connor T. Hansen and Callow that all polygraph evidence should be inadmissible. It will be referred to hereinafter as the “minority” opinion.) See also *United States v. Wilson*, 361 F. Supp. 510, 512 (D. Md. 1973) (unusual responsibility placed on examiner).

34. Brief of Plaintiff in Error at 22-23, *McLemore v. State*, 87 Wis. 2d 739, 275 N.W.2d 692 (1979) (quoting *United States v. Alexander*, 526 F.2d 161, 168 (8th Cir. 1975)).

35. *Id.* at 23.

36. See text accompanying notes 32-35 *supra*.

37. “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor” U.S. CONSR. amend. VI. These rights were made obligatory upon the states through the fourteenth amendment in *Pointer v. Texas*, 380 U.S. 400 (1965) (right of confrontation), and in *Washington v. Texas*, 388 U.S. 14 (1967) (right to compulsory process).

Chambers v. Mississippi, 410 U.S. 284 (1973) (involving the right of an accused murderer to confront and cross-examine a person who confessed to the murder, but later repudiated the confession, and the right of the accused to introduce the testimony of three witnesses to whom the other person confessed) stated the following with regard to an accused’s right to confront the witnesses against him:

The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations. *The rights to confront and cross-examine witnesses and to call witnesses in one’s own behalf have long been recognized as essential to due process.* Mr. Justice Black, writing for the Court in *In re Oliver* . . . identified these rights as among the minimum essentials of a fair trial:

A person’s right to reasonable notice of a charge against him, and an opportunity to be heard in his defense — a right to his day in court — are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, *to offer testimony, and to be represented by counsel.*

Id. at 294 (emphasis added) (citation omitted).

graph witness.³⁸ However, many times the complexities of the polygraph examination may render cross-examination an ineffective alternative.³⁹ Therefore, it is essential to due process that the defendant be entitled to call expert witnesses in his own behalf to challenge the testimony of the polygraph examiner.⁴⁰ Providing for the defense to put on its own experts to impeach the examiner at the admissibility hearing, as *McLemore* does, gives the defense a limited⁴¹ right to present expert witnesses in its own behalf, and serves to assist the trial court in exercising its discretion to admit or withhold the polygraph evidence at trial, pursuant to *Stanislawski*.⁴²

B. Should Expert Rebuttal Testimony be Admissible at Trial?

At trial in *McLemore*, out of the presence of the jury, the defendant offered to have his own experts testify before the jury

38. 62 Wis. 2d at 742-43, 216 N.W.2d at 14.

39. It is . . . unfair to expect the defense attorney to be able to exercise the defendant's right to cross-examine to its fullest. Few attorneys know as much about polygraph examination as do the experts they try to interrogate. The polished and experienced expert witness can easily anticipate and outfox the non-expert.

Brief of Plaintiff in Error at 24, *McLemore v. State*, 87 Wis. 2d 739, 275 N.W.2d 692 (1979).

40. See *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Id.* at 302 (citations omitted).

"The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."

Washington v. Texas, 388 U.S. 14, 19 (1967), quoted in *Webb v. Texas*, 409 U.S. 95, 98 (1972).

Although these statements of the Court were not made with respect to fact situations involving the defense use of *expert* witnesses, the rationale behind the principles stated applies with equal force and validity to the right to present testimony of defense experts.

41. The defense's right to present its own expert witness to impeach the testimony of the examiner is "limited" in that the defense may only present its experts at the admissibility hearing and not at trial before the jury.

42. *Stanislawski* provides that "notwithstanding the stipulation the admissibility of the test results is subject to the discretion of the trial court, *i.e.*, if the trial judge is not convinced that the examiner is qualified or that the test was conducted under proper conditions he may refuse to accept such evidence." 62 Wis. 2d at 742, 216 N.W.2d at 14 (footnote omitted).

to impeach the testimony of the polygraph examiner. The trial court refused the defendant's offer. On appeal, although the defendant raised the issue, the supreme court did not directly address whether the refusal to allow defense experts to testify at trial was error. The only statement made by the court with regard to this issue was a reference to the holding in *Mendoza*:⁴³ "A four member majority of this court held that the trial court did not abuse its discretion in refusing to allow the defendant's experts to testify before the jury."⁴⁴ A three member minority in *Mendoza* would have held that the trial court did abuse its discretion in refusing to allow defendant to call expert witnesses to impeach the examiner's opinion before the jury.⁴⁵

It has already been noted that there is a significant need for a defendant to confront the testimony of the polygraph examiner with experts of his own.⁴⁶ *McLemore* provides for such a confrontation at the admissibility hearing, outside the presence of the jury. But, given the overwhelming and conclusive effect the testimony of a polygraph examiner can have on a jury,⁴⁷ is the admissibility hearing a sufficient protection of the defendant's due process right to a "fair opportunity to defend against the state's accusations"?⁴⁸ That is, should the defendant be given some opportunity to present experts of his own *at trial* to rebut the testimony of the examiner?

This is a difficult question,⁴⁹ dealing with a unique subject,⁵⁰

43. 80 Wis. 2d at 162, 258 N.W.2d at 278.

44. *McLemore v. State*, 87 Wis. 2d 739, 748, 275 N.W.2d 692, 696 (1979).

45. 80 Wis. 2d at 162-63, 258 N.W.2d at 277-78. The minority, Justices Day, Hefferman and Abrahamson, argued that polygraph testimony should be treated the same as other forms of expert testimony, *i.e.*, it should be subject to impeachment by other expert testimony. The "discerning judgment of the jury" and the vigorous exercise of discretion by the trial court, it was argued, could adequately serve as a safeguard to overcome or prevent a "battle of experts." This portion of the majority opinion will be referred to as the "minority" opinion.

46. See text accompanying notes 32-40 *supra*.

47. See text accompanying notes 34-35 *supra*.

48. See *Chambers v. Mississippi*, 410 U.S. 284 (1973): "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the state's accusations." *Id.* at 294.

49. The difficulty of this question stems, in part, from the lack of precedent on this question. The writer was unable to find any appellate decision directly on point. *But see* *Galloway v. Brewer*, 525 F.2d 369 (8th Cir. 1975), *cert. denied*, 424 U.S. 974 (1976) (indicating that in cases where the absence of the defendant's expert testimony to impeach the polygraph examiner at trial is prejudicial to him, such testimony should be admitted); see also Brief of Appellant and Cross-Respondent at 30 n.14, *State v. Mendoza*, 80 Wis. 2d 122, 258 N.W.2d 260 (1977) (discussing the practice in Arizona

and involving important competing interests. On the one hand are the constitutional rights of the defendant to due process and a fair trial.⁵¹ "The rights to confront and cross-examine witnesses and *to call witnesses in one's own behalf* have long been recognized as essential to due process."⁵² In addition, the defendant has a constitutional right to a jury trial.⁵³ This right encompasses "the common sense and collective judgment of his peers, derived after weighing facts and *considering the credibility of witnesses*."⁵⁴ The Wisconsin Supreme Court has also indicated that a defendant has a right to challenge testimony of state experts by introducing contrary evidence from his own experts.⁵⁵

of permitting defense expert testimony to impeach polygraph examiner's opinion at trial).

50. *United States v. Alexander*, 526 F.2d 161, 169 (8th Cir. 1975), finds polygraph evidence to be distinguishable from other types of scientific evidence. *Accord*, *United States v. Wilson*, 361 F. Supp. 510, 512-14 (D. Md. 1973).

51. *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). It is possible to waive fundamental constitutional rights. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (recognizing that the sixth amendment right to assistance of counsel can be waived by an accused). However, to be effective, a waiver of constitutional rights must be voluntary, knowing and intelligent. *Miranda v. Arizona*, 384 U.S. 436, 475 (1966), *cited with approval in United States v. Oliver*, 525 F.2d 731, 734-35 (8th Cir. 1975), *cert. denied*, 424 U.S. 973 (1976). Since a polygraph examination cannot be administered without full cooperation of the defendant, it is possible that "the mere taking of the examination is tantamount to a waiver of constitutional rights *if adequate warnings are given*." 525 F.2d at 735-36 (emphasis added).

The state argued in *McLemore* that the stipulation entered into by the defendant waived any constitutional right to present expert witnesses in his behalf that defendant might have had. Brief of Defendant in Error at 9. But, as the defendant pointed out, the stipulation dealt only with admissibility, not with cross-examination, impeachment or contradiction. Brief of Plaintiff in Error at 21. Furthermore, if the stipulation were meant to waive any rights other than the right to object to the admissibility of polygraph evidence, inadequate warnings were given under *Miranda* to make the waiver effective.

52. *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) (emphasis added).

53. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (holding that the sixth amendment right to a jury trial in criminal cases is obligatory on the states through the due process clause of the fourteenth amendment).

54. *United States v. Alexander*, 526 F.2d 161, 168 (8th Cir. 1975) (emphasis added). It was argued by the defendant on appeal that exclusion of the defense expert's rebuttal testimony removes the function of weighing the evidence from the jury and thus denies the defendant his right to a jury trial. Reply Brief of Plaintiff in Error at 3, *McLemore v. State*, 87 Wis. 2d 739, 275 N.W.2d 692 (1979).

55. *Watson v. State*, 64 Wis. 2d 264, 274, 219 N.W.2d 398, 403 (1973) held that testimony of the state's witness, identifying chin hair found at scene of crime as that of the defendant, "was a matter of expert testimony that could be challenged by cross-examination or by impeaching evidence, either from other [defense] experts or from

On the other hand is the state's interest in assuring both fairness and reliability in the ascertainment of guilt and innocence.⁵⁶ This requires the accused, in the exercise of his rights, to comply with established rules of procedure and evidence.⁵⁷ Therefore, in appropriate cases, a defendant's rights may have to bow to accommodate other legitimate interests in the trial process.⁵⁸ The major interest of the state in barring defense expert rebuttal testimony at trial is to prevent misleading the jury, confusing the issues, and wasting time.⁵⁹ Specific problems that may arise if defense expert testimony to impeach the examiner is permitted are: (1) the potential for transforming a criminal trial into a "battle of experts"; (2) the possibility that the central issue before the jury may become the reliability of the polygraph rather than the guilt or innocence of the defendant; and (3) the appearance that the polygraph examiner is on trial rather than the defendant.⁶⁰

The state's concern with the fair and orderly conduct of trials is reflected in statutory evidentiary rules. Briefly stated, some of the applicable rules are as follows: (1) Generally, all relevant⁶¹ evidence is admissible;⁶² (2) Expert testimony is admissible if it will assist the trier of fact to understand the evidence or to determine a fact in issue;⁶³ (3) Expert opinion

treatises." See also *Milbauer v. Transport Employees' Mut. Ben. Soc'y*, 56 Wis. 2d 860, 867, 203 N.W.2d 135, 139 (1973), stating, in the context of a civil action, that "[a] party may offer conflicting evidence through other experts even if the other party's expert is well-qualified."

56. See *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).

57. *Id.* at 302.

58. *Id.* at 295. It should be noted that where constitutional rights directly affecting the ascertainment of guilt are implicated, rules of procedure and evidence should not be applied mechanistically to defeat the ends of justice. Cf. 410 U.S. at 302 (conflict between application of hearsay rule and due process rights).

59. See Wis. STAT. § 904.03 (1977). See also Brief of Defendant in Error at 4-5, *McLemore v. State*, 87 Wis. 2d 739, 275 N.W.2d 692 (1979).

60. Brief of Defendant in Error at 4-5, *McLemore v. State*, 87 Wis. 2d 739, 275 N.W.2d 692 (1979).

61. "Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Wis. STAT. § 904.01 (1977) (emphasis added).

62. Wis. STAT. § 904.02 (1977). This general rule is subject, of course, to Wis. STAT. § 904.03 (1977), which provides that "relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

63. Wis. STAT. § 907.02 (1977).

testimony on an ultimate issue is not objectionable;⁶⁴ and (4) A party has a right to introduce evidence relevant to weight or credibility.⁶⁵

After considering the competing interests outlined above,⁶⁶ the holding of *McLemore*, entitling the defense to introduce expert testimony to impeach the polygraph examiner at the admissibility hearing, *alone*, is insufficient to protect the due process right of the defendant. First, the rights of the defendant to due process (including the rights to confront and cross-examine witnesses and to call witnesses in one's own behalf), a fair trial, and a jury trial, can be adequately protected only if the defendant is given an opportunity to rebut and impeach the testimony of the examiner at trial in the presence of the jury with his own expert testimony.⁶⁷ The unchallenged testimony of a polygraph examiner can have an overwhelming and conclusive effect on a jury.⁶⁸ If precluded from hearing both sides of expert testimony on the polygraph examination of the defendant, the jury is hindered in performing its rightful role as the trier of fact.⁶⁹ Defense counsel may be unable to effectively cross-examine the polished and experienced polygraph examiner.⁷⁰ Therefore, the rebuttal testimony of the defendant's own experts is necessary to confront the expert witness against the defendant.

Second, other kinds of expert testimony may be impeached by the opposing party's own experts at trial.⁷¹ Although polygraph testimony is unique among other types of scientific evidence,⁷² admitting expert rebuttal testimony regarding polygraph evidence does not deviate from present practice with respect to expert testimony. Indeed, such an approach would

64. WIS. STAT. § 907.04 (1977).

65. WIS. STAT. § 901.04(5) (1977).

66. See text accompanying notes 51-65 *supra*.

67. See text accompanying notes 36-40 *supra*.

68. See *United States v. Alexander*, 526 F.2d 161, 168 (8th Cir. 1975).

69. *Cf. id.* (holding polygraph evidence not stipulated to inadmissible). It can further be argued that the defendant is deprived of his right to a jury trial because the jury is prevented from deciding credibility and how much weight to give the evidence. Reply Brief of Plaintiff in Error at 3, *McLemore v. State*, 87 Wis. 2d 739, 275 N.W.2d 692 (1979).

70. See note 39 *supra*.

71. See, e.g., *Watson v. State*, 64 Wis. 2d 264, 274, 219 N.W.2d 398, 403 (1974).

72. *United States v. Alexander*, 526 F.2d 161, 169 (8th Cir. 1975).

be in line with the general rule now followed as to expert testimony.⁷³

Both the defendant's need to present the testimony of his own experts to preserve certain rights and the dangers inherent in the presentation of such testimony are interests of significant weight. Some provision must be made for the defendant to present his own experts, at trial, before the jury, subject to safeguards designed to protect the trial from becoming a "battle of experts." This is not a situation where the rights of a defendant must be completely overridden to accommodate a legitimate interest of the state. Less severe alternatives exist which protect the defendant's rights and which, at the same time, insure that the state's interest in the fair and reliable ascertainment of guilt is preserved.

Two possible solutions⁷⁴ have been suggested by precedent. The first, and more conservative, approach is loosely based on *Galloway v. Brewer*.⁷⁵ It would provide that, after hearing the proffered testimony of the defendant's experts at the admissibility hearing, the trial court determine whether such testimony should be admissible at trial.⁷⁶ The test for admissibility would be: Does the admissible evidence produced by defendant's experts at *voir dire* have such probative value regarding the polygraph examination results and the examiner's testimony that its absence from trial would result in a deprivation of due process to the defendant?⁷⁷ This approach serves to bal-

73. See, e.g., *Watson v. State*, 64 Wis. 2d 264, 274, 219 N.W.2d 398, 403 (1974).

74. Two other possible approaches might be the following: (1) The defense may present experts at trial to rebut the examiner's testimony only if provided for in the stipulation on admissibility; (2) The defense may present experts at trial to rebut the examiner's testimony, subject to the applicable rules of evidence, unless it has agreed otherwise in the stipulation on admissibility.

75. 525 F.2d 369 (8th Cir. 1975), cert. denied, 424 U.S. 974 (1976). Upon appeal from a state trial court's placing of limitations on admissibility of polygraph evidence, the 8th circuit ordered the district court to hold a hearing, at which the defendant was to be allowed to present the testimony of an expert of his choosing to rebut the testimony of the examiner at trial. The appeals court further ordered that if, after conducting the hearing, the district court found that the admissible evidence so produced was of such probative value that its absence from the previous trial of defendant resulted in prejudice to him, then the district court was to order the state to retry defendant and permit the introduction of such polygraph testimony at the new trial.

76. See *id.*

77. The use of the standard "deprivation of due process" is based on the general rule in *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973), that the right to call witnesses in one's own behalf is essential to due process. The rest of the test is derived from *Galloway v. Brewer*, 525 F.2d at 371.

ance the competing interests of the state and the defendant. By limiting the use of the defense expert's testimony only to situations where it is essential to due process, testimony of lesser probative value is prevented from misleading the jury, confusing the issues, or wasting time. However, where doubts exist as to whether exclusion of the testimony at trial will deprive the defendant of due process, they should be resolved in favor of the defendant.

The second alternative would permit defense experts to testify at trial before the jury, subject to the evidentiary rules governing expert testimony.⁷⁸ The state's interest in a fair and orderly trial would be protected by careful application of section 904.03 of the Wisconsin statutes and by a judicious application of the court's "discretion" to admit or withhold polygraph evidence under *Stanislawski*. The "minority" opinion⁷⁹ in *Mendoza* clearly sets forth the respective roles of the trial court and the jury, and the treatment to be given such evidence.

The state's complaint that such testimony may lead to a battle of experts may be true. But this problem is present in every area of expert testimony and the best solution is the discerning judgment of the jury. The trial court may exercise its discretion vigorously to prevent cumulative testimony or digressions. A court may, in addition, excuse the jury at any time and reassert its prerogative to take evidence and exercise its discretion to exclude the polygraph evidence entirely. But where . . . the offer of extrinsic evidence goes to the heart of the issue of whether the examination was properly administered and the data properly interpreted, a minority of this court would hold the proponent of such evidence must be given some latitude.⁸⁰

78. See Brief of Appellant and Cross-Respondent at 30 n.14, *Mendoza v. State*, 80 Wis. 2d 122, 258 N.W.2d 260 (1977). Apparently, this is the procedure in Arizona, the state from which the *Stanislawski* rule was adopted. *State of Ariz. v. Samuel Pete*, No. CR-77905 (Sup. Ct., State of Ariz., County of Maricopa) (cited in Brief of Appellant and Cross-Respondent, *id.*) is illustrative of lower court decisions in which testimony of a defense expert was admitted to rebut the examiner's testimony. *But see State v. Seebold*, 111 Ariz. 423, 531 P.2d 1130 (1975) (holding that there was no error in the trial court's exclusion at trial of evidence of a polygraph examination of defendant, taken by an independent examiner, to impeach the testimony regarding the stipulated polygraph examination).

79. See note 45 *supra*.

80. 80 Wis. 2d at 163, 258 N.W.2d at 278.

In the future, these alternatives will be available for the Wisconsin Supreme Court to consider.

C. *Should Stanislawski be Overruled?*

A three-member minority of the court in *McLemore*⁸¹ stated that it would overrule the court's previous holding in *Stanislawski*.⁸² Further, on retrial of the *McLemore* case, the minority would hold that none of the testimony or evidence as to the polygraph examination would be admissible. The minority concluded "that polygraphy in its present state may be useful as an investigative tool, but its limitations and potential for misleading fact finders are such that it should not be a part of our evidentiary system."⁸³ Generally stated, the minority presents two major reasons for its holding. First, the minority does not believe that "the search for truth" in a criminal trial should be left to the *subjective*, and, therefore, possibly inaccurate interpretation of scientific data (polygraph examination results), by an "artist" (the polygraph examiner), as opposed to a scientist.⁸⁴ Second, the dissent points out the dangers that the jury may be misled in relying too heavily on the expert opinion of the examiner regarding the defendant's truthfulness, that the issues will be confused, and that too much time will be consumed by polygraph evidence.⁸⁵

While these objections to admissibility of polygraph evidence have some merit, countervailing circumstances and safeguards outweigh them and make the admissibility of polygraph evidence desirable. First, polygraph evidence is by no means the sole or primary determinant in the "search for truth" in a criminal trial. By the very terms of *Stanislawski*, polygraph evidence is limited to playing a corroborative or impeachment role.⁸⁶ This requires that other evidence of guilt or innocence be first introduced before any polygraph evidence is admissible. Second, sufficient safeguards exist in the trial process to pre-

81. 87 Wis. 2d at 749-51, 275 N.W.2d at 697-98 (the "minority" opinion).

82. 62 Wis. 2d 730, 216 N.W.2d 8 (1974) (holding polygraph evidence to be admissible in criminal trials in Wisconsin, subject to certain conditions, one of which being that all parties sign a written stipulation as to admissibility).

83. 87 Wis. 2d at 751, 275 N.W.2d at 698.

84. 87 Wis. 2d at 749-50, 275 N.W.2d at 697 (citing Abbell, *Polygraph Evidence: The Case Against Admissibility in Federal Criminal Trials*, 15 AM. CRIM. L. REV. 29 (1977)).

85. 87 Wis. 2d at 751, 275 N.W.2d at 697-98.

86. 62 Wis. 2d at 742, 216 N.W.2d at 14.

vent inaccurate interpretations of examination results from reaching the jury or from going unnoticed by the jury. For example, at the *voir dire* of the polygraph examiner, the defendant is entitled to introduce experts of his own to impeach the examiner's interpretation of the polygrams.⁸⁷ If the trial judge is not convinced that the examiner is qualified or that the test was conducted under proper conditions, he may refuse to admit such evidence.⁸⁸ Once at trial, the defense may cross-examine the polygraph examiner as to his qualifications, methods and techniques.⁸⁹ During the trial, the jury determines what weight and credibility to give to the examiner's conclusions; at all times, the trial court may, in its discretion, admit or exclude evidence.⁹⁰

Third, adequate safeguards exist to prevent misleading the jury, confusing the issues, or wasting time. An objection on such grounds is available to either party throughout the proceedings.⁹¹ And, as mentioned above, the trial court may, at any time, vigorously exercise its discretion to prevent cumulative testimony and digressions.⁹²

Finally, there are several policy reasons which mandate that *Stanislawski* be retained in Wisconsin. (1) The stipulation to admit polygraph evidence has utility. For the defendant who is innocent, it provides a means by which he may overcome substantial circumstantial evidence of guilt.⁹³ For the prosecution, it aids in obtaining confessions from guilty defendants.⁹⁴ (2) When administered by competent, experienced examiners, the polygraph has a high degree of accuracy and reliability.⁹⁵

87. 87 Wis. 2d at 749, 275 N.W.2d at 697 (1979).

88. 62 Wis. 2d at 742, 216 N.W.2d at 14 (1974).

89. *Id.* at 742-43, 216 N.W.2d at 14.

90. *State v. Mendoza*, 80 Wis. 2d 122, 163, 258 N.W.2d 260, 278 (1977) ("minority" opinion). See also note 62 *supra*.

91. Wis. STAT. § 904.03 (1977).

92. *State v. Mendoza*, 80 Wis. 2d 122, 163, 258 N.W.2d 260, 278 (1977) ("minority" opinion). See also note 62 *supra*.

93. REID & INBAU, *supra* note 5, at 297, 299. See, e.g., *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) (the first recorded case dealing with admissibility of deception detection evidence). In *Frye*, the appeals court affirmed the district court's holding sustaining the government's objection to the admissibility of a crude lie detection test exculpating defendant. The defendant was convicted of second degree murder. Three years later, another person confessed to the murder and the defendant was released. E. BLOCK, LIE DETECTORS: THEIR HISTORY AND USE 26 (1977).

94. See, e.g., *McAdoo v. State*, 65 Wis. 2d 596, 223 N.W.2d 521 (1974).

95. REID & INBAU, *supra* note 5, at 365. For a good survey of sources on the accuracy

(3) Both parties should be allowed to stipulate to the admissibility of evidence, including polygraph evidence.⁹⁶ (4) Either the defense or the prosecution may prevent admissibility of polygraph evidence by refusing to stipulate thereto.⁹⁷

Given already existing safeguards, and considering that polygraph evidence is only admissible upon *agreement of all the parties*, *Stanislawski* and its progeny provide a fair and equitable solution to the question of polygraph evidence admissibility. Therefore, *Stanislawski* should not be overruled.

IV. CONCLUSION

McLemore v. State represents an important and necessary contribution to the law on polygraph evidence in Wisconsin. The court defined and clarified a defendant's right to call his own polygraph expert at the admissibility hearing in order to impeach the testimony of the polygraph examiner. This rule is supported by a defendant's right to cross-examine and impeach prosecution witnesses, as well as by his right to call witnesses in his own behalf. The rationale of *McLemore* applies with equal force in the context of the jury trial itself. The jury is the trier of fact and should be permitted to weigh the conflicting testimony of polygraph experts. However, the trial court must insure that the trial does not become a "battle of experts," confusing the issues and wasting time. These dangers, however, exist with the use of all expert testimony and sufficient safeguards are available to prevent such occurrences. There are workable alternative procedures which would permit the use, at trial, of testimony from opposing polygraph experts. As an individual's freedom is at stake in a criminal trial, constitutional guarantees of due process would seem to mandate the admissibility of testimony offered by defense polygraph experts.

McLemore also continues a movement by a minority of the Wisconsin Supreme Court to abolish the admissibility of poly-

and reliability of polygraph examinations, see Abrams, *Polygraphy Today*, 3 NAT'L J. CRIM. DEF. 85, 90-92 (1977).

96. Stipulating to the admissibility of polygraph evidence is tantamount to an evidentiary waiver of objections to admissibility. *Lhost v. State*, 85 Wis. 2d 620, 646, 271 N.W.2d 121, 133 (1978). If a person wants to waive his right to object to the admissibility of polygraph evidence, he should be allowed to do so. See generally *Miranda v. Arizona*, 384 U.S. 436, 475 (1966).

97. See *State v. Stanislawski*, 62 Wis. 2d 730, 741, 216 N.W.2d 8, 14 (1974) (requiring that all parties sign stipulations before polygraph evidence is admissible).

graph testimony. That drastic step may be unwarranted. Polygraph evidence is subject to criticism because it depends upon the subjective interpretation of data by a human being and thus may be subject to error. However, the same criticism may be made of any kind of evidence involving human perception and judgment. The solution to the problem is not to prohibit the admission of polygraph evidence. Rather, existing rules of evidence should be utilized, and new safeguards developed if necessary, so that only the most trustworthy and reliable evidence will be presented to the trier of fact.

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EDITOR'S NOTE: After this article was prepared for publication, the Wisconsin Court of Appeals decided *State v. Craft*, 93 Wis. 2d 55, 286 N.W.2d 619 (Ct. App. 1979). Therein it was decided that the trial court properly excluded the results of a polygraph examination where the stipulation as to admissibility was signed only by the prosecutor and the suspect who was not represented by counsel.

It was stated in *Craft* that a "defendant or suspect must be represented, and his counsel must join with the defendant and the prosecutor in signing the stipulation for admission of polygraph testimony into evidence at a subsequent trial." *Id.* at 61, 286 N.W.2d at 621. The court also intimated that a defendant could make a knowing and voluntary waiver of counsel before signing the stipulation. *Id.* However in *Craft* the court found insufficient evidence of a waiver of counsel by the defendant.

