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The Wisconsin Supreme Court, in *State v. Dean*,¹ abandoned a seven year precedent when it decided that polygraph evidence² will no longer be admissible in criminal trials. It reached that conclusion by deciding that the conditions adopted in *State v. Stanislawski*³ had proved unsatisfactory as a means of enhancing the reliability of polygraph evidence and protecting the integrity of the trial process.⁴ In *Stanislawski*, the seminal case in Wisconsin, polygraph evidence was declared admissible. In changing its posture from a blanket exclusion, the *Stanislawski* court adopted the criteria set forth by the Arizona Supreme Court in *State v. Valdez*.⁵

1. 103 Wis. 2d 228, 307 N.W.2d 628 (1981).
2. Polygraphy, commonly known as “lie-detection,” is a technique for detecting a subject's attempts to give false answers to an examiner's questions. The technique is based on the theory that an individual's conscious attempts to deceive the examiner will produce involuntary physiological changes due to an acute reaction in the subject's autonomic nervous system, the reflexive system that controls normal body functions. The polygraph machine is an electromechanical instrument that measures and records the physiological responses. The polygraph examiner studies the recorded fluctuations to determine whether they indicate an attempt to deceive. For a succinct history of the development of polygraphy see J. Reid & F. Inbau, *Truth and Deception: The Polygraph (“Lie-Detector”) Technique* 2-5 (2d ed. 1977).
3. 62 Wis. 2d 730, 216 N.W.2d 8 (1974).
4. *State v. Dean*, 103 Wis. 2d at 229, 307 N.W.2d at 653.
5. 91 Ariz. 274, 371 P.2d 894 (1962). The criteria established in *Valdez* as a precondition to the admission of polygraph evidence are:

   1. That the county [district] attorney, defendant and his counsel all sign a written stipulation providing for defendant's submission to the test and for the subsequent admission at trial of the graphs and the examiner's opinion thereon on behalf of either defendant or the state.

   2. That notwithstanding the stipulation the admissibility of the test results is subject to the discretion of the trial judge, 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.

   3. That if the graphs and examiner's opinion are offered in evidence the opposing party shall have the right to cross-examine the examiner respecting:

      a. the examiner's qualifications and training;
Wisconsin is the second state to reverse its position on the admissibility of polygraph evidence. In *Fulton v. State*, the Oklahoma Court of Criminal Appeals also reversed a line of cases which established the admissibility of polygraph evidence on stipulation. That court maintained that the potential unreliability of the polygraph test dictated its total exclusion.

It is clear from dicta in *Dean* that *Dean* is not the last word in Wisconsin on polygraph evidence. It is a reaction to the debate over the effectiveness of the *Stanislawski* conditions in handling the problems peculiar to polygraph evidence. If guidelines better equipped to regulate the admission of polygraph test results are devised, the *Dean* decision will doubtless be re-examined. This note will explore the weaknesses of the *Stanislawski* test and analyze the ramifications of the *Dean* court's decision.

I. THE FACTUAL SETTING

In *Dean*, the defendant signed a written stipulation without representation by counsel. A polygraph test produced results unfavorable to the defendant. Since the first condition of *Stanislawski* required that "the district attorney, defendant and his counsel all sign a written stipulation . . . ." the defendant objected at trial to the admission of the results on the ground that the stipulation was signed without benefit of

b. the conditions under which the test was administered;

c. the limitations of and possibilities for error in the technique of polygraphic interrogation; and

d. at the discretion of the trial judge, any other matter deemed pertinent to the inquiry.

(4) That if such 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 that at the time of the examination defendant was not telling the truth. Further, the jury members should be instructed that it is for them to determine what corroborative weight and effect such testimony should be given.

*Id.* at 371 P.2d at 900-01.


8. *Id.*

The objection was overruled and the results were received into evidence. Dean was convicted of failing to remain at the scene of an accident resulting in injury.

Dean appealed, contending that entering into a Stanislawski stipulation is a tactical decision for defense counsel, and a defendant cannot voluntarily and intelligently execute a stipulation without the advice of counsel. Basing its decision on State v. Craft, the court of appeals held that defendants may execute valid stipulations if they have waived the right to counsel for purposes of the stipulation. Since no hearing was held, the court concluded that the evidence should not have been admitted and reversed the conviction.

On appeal to the supreme court, both sides proposed alternatives to the Stanislawski conditions to deal with situations in which an unrepresented defendant proceeds with a polygraph test. The Wisconsin Supreme Court declined to fashion any new extensions of Stanislawski before re-examining the effectiveness of the stipulation in regulating polygraph test results. Because Stanislawski failed to effectively ensure the reliability of the test results and protect the integrity of the trial, the court declined to permit the future admission of polygraphic evidence pursuant to the Stanislawski conditions.

II. THE HISTORY OF POLYGRAPH EVIDENCE IN WISCONSIN

Before Stanislawski, Wisconsin had a blanket rule excluding polygraph evidence. In State v. Bohner, the court relied on Frye v. United States to conclude that polygraph evidence was inadmissible for any purpose and under any circumstances. Frye is the seminal United States Supreme Court case on the admissibility of polygraph evidence.

10. 103 Wis. 2d at 230, 307 N.W.2d at 629.
11. Id. at 231, 307 N.W.2d at 630.
12. Id.
13. Id.
14. 93 Wis. 2d 55, 286 N.W.2d 619 (Ct. App. 1979), aff'd on other grounds, 99 Wis. 2d 128, 298 N.W.2d 530 (1980).
15. For a discussion of the hearing requirement, see Faretta v. California, 422 U.S. 806 (1975). In Faretta, the United States Supreme Court established the conditions under which a defendant may waive the right to have appointed counsel.
16. State v. Dean, 103 Wis. 2d at 229, 307 N.W.2d at 653.
17. 210 Wis. 651, 246 N.W. 314 (1933).
18. 293 F. 1013 (D.C. Cir. 1923).
case in a line of cases rejecting the admission of polygraph evidence. It is notable for its establishment of the "general acceptance"19 test as the measure of when polygraph evidence becomes sufficiently reliable to merit its admission at trial. In reaching its conclusion in Bohner, the Wisconsin court explained that this threshold test had not been met. A hasty acceptance of polygraph evidence, it was feared, would lead to confusion at trial as the proponents presented elaborate explanations of the testing process to the jury.20 There was also concern that the trial would become a trial of the lie detector test,21 and that defendants might seek to use favorable test results without taking the stand or without submitting to tests arranged by the prosecution.22 This strict posture was maintained until Stanislawski.23

In Stanislawski, the court recognized a "marked change in acceptance of polygraph testing in the forty-plus years since Bohner and fifty-plus years since Frye."24 Polygraph evidence had moved out of the "twilight zone"25 of Frye and no longer required unconditional exclusion.26 Therefore, the Valdez conditions were adopted by the Stanislawski court and held to apply to all subsequent cases. The conditions required: (1) the district attorney, defendant and his counsel to sign a written stipulation agreeing to admit the test results at trial; (2) the trial court to exercise discretion in the final decision as to admissibility; (3) the examiner to submit to cross-examination as to his qualifications, testing conditions, testing limitations and other pertinent matters; and (4) the judge to give a special instruction27 to inform the jury of the value of the evidence.28

19. Id. at 1014.
20. 210 Wis. at 658-59, 246 N.W. at 317.
21. Id. at 659, 246 N.W. at 318.
22. Id.
25. Frye v. United States, 293 F. at 1014.
26. 62 Wis. 2d at 741, 216 N.W.2d at 13.

During this trial you have heard the testimony of (name of witness) pertaining to the results of a polygraph test (also known as a lie detector test) taken by
Although admissible, the evidence could be used only to corroborate or impeach. 29

Once the court adopted the Stanislawski conditions, it adhered to them strictly, refusing to admit any evidence not procured in compliance with them. 30 Strict adherence to the written stipulation rule was defended as a procedural safeguard designed to avoid disputes over the contents of the agreement. 31 The court also maintained that the written stipulation rule enhanced the reliability of the polygraph test results by encouraging discussion and agreement as to the test conditions and questions, the qualifications of the examiner and the designation of the examiner. 32

Unanimous acceptance of Stanislawski, however, began to wane. In McLemore v. State, 33 for example, the minority opinion stated that polygraph evidence should be inadmissible. 34 The minority maintained that the use of polygraph evidence should be limited to investigation. 35

(name of person who took the test). The examiner's testimony by itself does not tend to prove or disprove any element of the crime with which the defendant has been charged, but at most tends to indicate whether (name of person who took the test) was telling the truth at the time he took the polygraph examination. You are not bound by the opinions of any expert. You should consider all of the evidence in the case, and you should consider carefully the opinion evidence with all the other evidence in the case, giving to it just such weight and credit as you deem it is entitled to receive.

29. Id. at 743, 216 N.W.2d at 14.
30. See Robinson v. State, 100 Wis. 2d 152, 301 N.W.2d 429 (1981); Lhost v. State, 85 Wis. 2d 620, 271 N.W.2d 121 (1978); Zelenka v. State, 83 Wis. 2d 601, 266 N.W.2d 279 (1978); State ex rel. Harris v. Schmidt, 69 Wis. 2d 668, 230 N.W.2d 890 (1975); Gaddis v. State, 63 Wis. 2d 120, 216 N.W.2d 527 (1974) (decided 10 days after Stanislawski).
31. 62 Wis. 2d at 744, 216 N.W.2d at 15.
33. 87 Wis. 2d 739, 275 N.W.2d 692 (1979).
34. Id. at 749, 275 N.W.2d at 697. See also Lhost v. State, 85 Wis. 2d at 649, 271 N.W.2d at 135 (Connor Hansen, J., dissenting); State v. Mendoza, 80 Wis. 2d at 190, 258 N.W.2d at 290 (Connor Hansen, J., dissenting).
35. 87 Wis. 2d at 751, 275 N.W.2d at 698.
III. THE WEAKNESSES OF Stanislawski

A. Enhancing Reliability

1. The Test Itself

The legal community is divided on the reliability of polygraph evidence in detecting deception. Some critics claim that there is no firm scientific proof that lying necessarily produces a physiological reaction. Others, while accepting some natural physiological reaction to lying, doubt that these reactions are so universal as to permit standardized measurement. It is argued that there are gradations of truth and truthfulness means different things to different persons. In addition, critics point to the many variables that affect the test results. Of greatest concern are the subject’s testability, the examiner’s ability and the testing technique’s ability to adjust these variables. Uncontrollable factors influencing the examination include the defendant’s lack of concern about detection, tension or nervousness, involvement in similar crimes, exhaustion or physical discomfort, drug use before the test, medical problems and sociopathic personality. Even such conditions as asthma, hay fever, coughing, allergies and hiccups alter the test results. Problems are multiplied when the subject is a child or a mentally retarded or feebleminded person.

Because of the doubts about the reliability of the test results, some states maintain a blanket exclusion of polygraph test results. Some federal courts have adopted what amounts
to a per se exclusionary rule. Other federal courts have let the trial court exercise its discretion in deciding whether the proffered evidence is sufficiently reliable to be of probative value. Still other states adhere to the written stipulation rule.

Only New Mexico has relaxed its rules to treat polygraph evidence like other expert evidence. In *State v. Dorsey*, the New Mexico court characterized the stipulation rule as mechanistic in nature and inconsistent with due process. It held polygraph evidence admissible when evidence is introduced to establish the expertise of the examiner, the quality of the testing procedure and the validity of the test conducted on the subject.

2. The Influence of the Examiner

Since polygraph test results must be interpreted, they are


The United States Supreme Court has not ruled on the admissibility of polygraph test results. The Court did refer to the matter in Schmerber v. California, 384 U.S. 757 (1966), in discussing the fifth amendment and self-incrimination. It distinguished compelled "communications" or "testimony," which the privilege does protect, from compelled tests which make a suspect the source of "real or physical evidence," which the fifth amendment does not protect. The Court explained that some tests directed at obtaining "physical evidence," such as lie detector tests, might actually be directed to eliciting responses which were essentially testimonial. The Court stated that to compel a person to submit to testing in which an effort would be made to determine guilt or innocence on the basis of physiological responses, whether willed or not, would evoke the spirit and history of the fifth amendment. *Id.* at 764.

46. See United States v. Bursten, 560 F.2d 779 (7th Cir. 1977); United States v. Smith, 552 F.2d 257 (8th Cir. 1977); United States v. Demma, 523 F.2d 981 (9th Cir. 1975).


48. 88 N.M. 184, 539 P.2d 204 (1975).

49. *Id.* at 184, 539 P.2d at 205.

50. *Id.* at 184, 539 P.2d at 204.
by their very nature dependent upon the competence, experience and training of the examiner. The interaction of the examiner and examinee and the conditions under which the test are conducted all play a critical role in the polygraph test. As the Dean court noted, if an accurate examination is to be given, the examiner must be familiar with the examinee and the alleged crime, conduct a pretest interview to screen out the unsuitable examinee, adjust the machine to handle all relevant variables, supervise the testing environment, prepare and deliver the questions and interpret the results. Consequently, courts are concerned about the qualifications and honesty of the examiners. There is a fear that the profession has neither developed a minimum level of competency nor devised an effective means of policing itself.

The courts are primarily concerned about the possibility of "friendly examiners." Unless strict restrictions are instituted, it is argued, defendants will shop around for an examiner willing to give them the results they desire. Defendants may also take a test repeatedly until they condition their responses to beat the test.

3. Effectiveness of Stanislawski

The Dean court concluded that the conditions of Stanislawski did not effectively deal with these problems. First, it noted that the written stipulation by itself does not enhance or ensure the reliability of the test results. The stipulation is merely a waiver of the party's objection to the reliability of the evidence. While the stipulation may encourage discussion and agreement about the performance of the test, the reliability of the test cannot be determined until after the exam-

52. The Dean court noted that Wisconsin has no law providing for the licensing, regulating and disciplining of polygraph operators. Id. at 236 n.4, 307 N.W.2d at 632 n.4.
57. 103 Wis. 2d at 268, 307 N.W.2d at 637.
ination has been administered.\textsuperscript{58} At that point all of the controllable and uncontrollable variables can be evaluated, and their impact on the test results can be determined.

Second, the court noted that trial courts are unable to adequately ensure reliability through their discretionary powers because no guidelines for determining reliability have been provided.\textsuperscript{59} It was unclear to the court whether an admissibility hearing should be conducted before each trial.\textsuperscript{60} If a trial court is to adequately police the reliability of stipulated results, it must carefully inquire into the qualifications, training and experience of the examiner, the testing conditions, the suitability of the examinee and the interpretation of the results.\textsuperscript{61} It is likely that the probative value of the evidence would be outweighed by the burden this practice would place on the trial courts.\textsuperscript{62}

Third, the \textit{Dean} court found that cross-examining the examiner does not provide a sufficient basis by which the jury can assess the competence of the examiner and the merits of the test.\textsuperscript{63} In reaching that conclusion, the court relied on a rather weak argument, maintaining that cross-examination of an examiner is a formidable task because the attorney will rarely know as much as the expert.\textsuperscript{64} The court ignored the frequent involvement of complex material in medical malpractice and product liability cases. In those cases the attorneys must know more than the experts so that they can effectively impeach the experts through creative and insightful cross-examination.

\textbf{B. Preserving the Integrity of the Trial}

A second concern of the \textit{Dean} court as well as of other courts was that polygraph evidence disturbs the integrity of the trial. The use of polygraph evidence may waste time and confuse the issues as the proponent attempts to establish the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{58} \textit{Id.} at 267, 307 N.W.2d at 637.
\item \textsuperscript{59} \textit{Id.} at 272, 307 N.W.2d at 650.
\item \textsuperscript{60} \textit{Id.} at 270, 307 N.W.2d at 649.
\item \textsuperscript{61} \textit{Id.} at 270-71, 307 N.W.2d at 644.
\item \textsuperscript{62} \textit{Id.} at 273, 307 N.W.2d at 648.
\item \textsuperscript{63} \textit{Id.} at 274, 307 N.W.2d at 650-51.
\item \textsuperscript{64} \textit{Id.} at 275, 307 N.W.2d at 651 (quoting United States v. Wilson, 361 F. Supp. 510, 513 (D. Md. 1973)).
\end{itemize}
\end{footnotesize}
reliability of the results. Because the polygraph machine is a scientific instrument, juries may regard it as infallible and give conclusive weight to the examiner's opinion about the truthfulness or untruthfulness of the examinee. Since polygraph evidence is different in kind from other expert evidence, this is a valid concern. The same complexities are not present in fingerprinting, handwriting, voice prints, ballistics, and neutron activation analysis. Unlike other scientific evidence which may be used to identify an individual or object allegedly involved in the perpetration of a criminal act, polygraph evidence purports to settle the sole issue reserved for the jury in a criminal case — guilt or innocence.

Because a court cannot be sure of the impact polygraph evidence has on the jury, the effectiveness of limiting instructions is uncertain. Moreover, the Dean court emphasized that the impeachment limitations imposed by the Stanislawski conditions hamper a party's ability to attack the competence of the examiner or the conditions of the examination. This, the court maintained, impedes the jury's ability to understand the strengths and weaknesses of the instrument and to evaluate the testimony. The alternative of allowing polygraph experts to testify to impeach the testimony of the examiner, the court recognized, may create even more difficulties by placing the polygraph machine and operator on trial. That fear was originally expressed in Boehner and is still widely recognized.

IV. THE FUTURE OF POLYGRAPH EVIDENCE IN WISCONSIN CRIMINAL TRIALS

As the dicta in Dean indicates, this decision is not the final
word on the use of polygraph evidence in Wisconsin criminal trials. Rather, the decision represents the court's dissatisfaction with the application of Stanislawski. The court noted that Stanislawski was a special case. The defendant was charged with rape. The complaining witness identified him as her assailant, while his sister testified he was at home. The physical evidence did not support the charge. Two polygraph tests taken by the defendant indicated he was telling the truth, while two tests taken by the complaining witness indicated she was untruthful. The trial court refused to admit the results and the defendant was convicted. The Dean court implied that the special nature of the Stanislawski case led to the adoption of the Valdez criteria; however, these conditions were not sufficient to handle the unanticipated problems that would arise.

In State v. Mendoza, the court had to confront the dilemma of the battle of the experts. Mendoza wished to call his own polygraph experts to testify before the jury. The trial court refused. The Wisconsin Supreme Court affirmed and held that the challenge to the reliability of polygraph evidence must be made at a pretrial hearing. While this blanket exclusion may deal with the battling experts dilemma, it hampers the trial judge's efforts to ensure that the jury has a proper perspective of the weight of this evidence.

The next dilemma facing the courts was distinguishing the polygraph examination results from possible confessions of the defendant. A major objection to polygraph tests is their tendency to induce confessions or, at a minimum, incriminating responses. Because the stipulation rule excludes unstipulated test results, evidence obtained in conjunction with the test may be excluded.

The turning point of the whole controversy was McMorris

74. 80 Wis. 2d 122, 258 N.W.2d 260 (1977).
75. Id. at 161, 258 N.W.2d at 288.
76. See Barrera v. State, 99 Wis. 2d 269, 298 N.W.2d 820 (1980); State v. Schlise, 86 Wis. 2d 26, 271 N.W.2d 619 (1978); Turner v. State, 76 Wis. 2d 1, 250 N.W.2d 706 (1977); McAdoo v. State, 65 Wis. 2d 596, 223 N.W.2d 521 (1974).
78. State v. Dean, 103 Wis. 2d 228, 258, 307 N.W.2d 628, 643 (1981).
McMorris involved facts similar to the facts in Stanislawski. McMorris was charged with armed robbery. At trial, the state presented only one witness — the victim who identified McMorris as the assailant who approached him from behind, took his wallet and pushed him. The defendant denied the charge. Because of the significance of the defendant's credibility, the defendant sought to introduce polygraph test results. The state refused to enter into a written stipulation and gave no reason. The trial court denied relief, based on Stanislawski, although the test results indicated McMorris was telling the truth. The defendant was convicted. The Seventh Circuit Court of Appeals held the prosecutor's veto constitutionally impermissible because no reason was given. The critical importance of credibility determination in the case, the court held, rendered the polygraph results so material that the very limited potential for confusion should not be sufficient to block the use of this evidence for unstated and potentially inappropriate reasons. The case was remanded for further inquiry into the reasons for refusal.

The Dean court recognized that the prosecutorial veto is an implicit problem of the stipulation rule. While the Massachusetts technique of allowing the court to appoint an examiner upon the request of the defendant may correct the veto problem, that practice will place additional burdens on the trial court.

Although dissatisfied with the operation of the Stanislawski requirements, the court recognized that polygraph evidence has probative value and some reliability. Unlike the Oklahoma court in Fulton, the Wisconsin court did not conclude that polygraph evidence is so unreliable that it should be excluded. The Dean decision represents primarily an administrative frustration with adapting Stanislawski to emerging problems. Rather than forge ahead with a standard that

79. 643 F.2d 458 (7th Cir. 1981).
80. McMorris v. Israel, 643 F.2d at 466.
81. Id. at 465.
83. State v. Dean, 103 Wis. 2d at 270, 307 N.W.2d at 648.
84. Id. at 278, 307 N.W.2d at 653.
85. Id.
does not adequately address the above problems, the court de-
cided to abandon that standard and start from the beginning.

V. CONCLUSION

Dean represents a new stage in Wisconsin polygraph law. Stanislawski proved unsatisfactory in dealing with the com-
peting values of reliable probative evidence and the integrity
of the trial process. Other states' procedures do not provide
an adequate replacement. Therefore, Wisconsin must formu-
late a new standard that is equipped to deal with the
problems inherent in polygraph testing. As the Seventh Cir-
cuit Court of Appeals explained in McMorris, for better or
worse, "[s]cientific evidence . . . has become more a part of
the ordinary trial . . . ."86

JANE C. SCHLICHT

CIVIL RIGHTS — Attorney Malpractice — Public

The Civil Rights Act of 1871, 42 U.S.C. section 1983, pro-
vides a civil cause of action against "[e]very person who,
under color of any statute, ordinance, regulation, custom, or
usage, of any State or Territory," deprives another person of
constitutional rights.1 In the last two decades, the number of
actions against public officials to enforce civil rights under
section 1983 has increased dramatically.2 Over the same pe-
riod, the number of state-funded public defender offices has
also increased, primarily in response to United States Su-
preme Court decisions holding that indigents have a constitu-

86. McMorris v. Israel, 643 F.2d 458, 462 (7th Cir. 1981).

the claim.

2. See 90 Harv. L. Rev. 1133, 1135-36, 1172 (1977). The increase followed the
Supreme Court decision in Monroe v. Pape, 365 U.S. 167 (1961), which held that
actions not authorized by a state may nevertheless be under color of state law for
purposes of § 1983, id. at 172, and that plaintiffs suing under § 1983 need not prove
that defendants acted with the intent to deprive a person of a federal right, id. at 187.
See 90 Harv. L. Rev., supra, at 1167-75.